(12)

No. 05-1631

Title: Timothy Scott, Petitioner
v.
Victor Harris

Docketed: June 23, 2006
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (03-15094)
Decision Date: December 23, 2005
Rehearing Denied: February 17, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 18 2006	Petition for a writ of certiorari filed. (Response due July 24, 2006)
Aug 9 2006	DISTRIBUTED for Conference of September 25, 2006.
Aug 28 2006	Response Requested . (Due September 27, 2006)
Sep 20 2006	Brief of respondent Victor Harris in opposition filed.
Oct 4 2006	DISTRIBUTED for Conference of October 27, 2006.
Oct 27 2006	Petition GRANTED.
Dec 8 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 13, 2006.
Dec 13 2006	Brief amicus curiae of United States filed.
Dec 13 2006	Brief amicus curiae of Georgia Association of Chiefs of Police, Inc. in support of neither party filed.
Dec 13 2006	Brief amici curiae of National Association of Counties, et al. filed.
Dec 13 2006	Joint appendix filed.
Dec 13 2006	Brief of petitioner Timothy Scott filed.
Dec 13 2006	Brief amici curiae of Illinois, et al. filed.
Dec 18 2006	SET FOR ARGUMENT ON Monday, February 26, 2007.
Dec 18 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 10 2007	CIRCULATED.
Jan 15 2007	Brief of respondent Victor Harris filed. (Distributed)
Jan 16 2007	Brief amicus curiae of National Police Accountability Project filed. (Distributed)
Jan 16 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 16 2007	Record received from U.S.D.C. for Northern District of Georgia. (1 box)
Jan 17 2007	Brief amici curiae of American Civil Liberties Union and ACLU of Georgia filed. (Distributed)
Jan 25 2007	Record received from U.S.C.A. for Eleventh Circuit. (1 envelope)
Feb 13 2007	Reply of petitioner Timothy Scott filed. (Distributed)
Feb 16 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 26 2007	Argued. For petitioner: Philip W. Savrin, Atlanta, Ga.; and Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus

curiae.) For respondent: Craig T. Jones, Atlanta, Ga.

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF, PETITIONER

v.

VICTOR HARRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PHILIP W. SAVRIN
Counsel of Record
Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000
Attorneys for Petitioner

CURRY & TAYLOR • WASH D.C. • (202) 393-4141 • USSCINFO.COM

QUESTIONS PRESENTED

1. Whether a law enforcement officer's conduct is "objectively reasonable" under the Fourth Amendment when the officer makes a split-second decision to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper, because the suspect had demonstrated that he would continue to drive in a reckless and dangerous manner that put the lives of innocent persons at serious risk of death.

2. Whether, at the time of the incident, the law was "clearly established" when neither this Court nor any circuit court, including the Eleventh Circuit, had ruled the Fourth Amendment is violated when a law enforcement officer uses deadly force to protect the lives of innocent persons from the risk of dangerous and reckless vehicular flight.

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IN THE

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TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF, PETITIONER

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VICTOR HARRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy Scott, a Coweta County, Georgia, deputy sheriff, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Harris v. Coweta County*, 433 F.3d 807 (2005), *vacating* 406 F.3d 1307 (2005). It is reproduced in the Appendix at 1a-29a. The opinion of the District Court is unreported and reproduced in the Appendix at 30a-58a.

JURISDICTION

On December 23, 2005, the Eleventh Circuit entered judgment. Deputy Scott filed a timely petition for rehearing *en banc* on January 11, 2006. The Eleventh Circuit entered an order denying the petition on February 17, 2006. Appendix at 59a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Respondent Victor Harris seeks damages for an alleged violation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT

This is a case of **first** impression for this Court involving the application of *Tennessee v. Garner*, 471 U.S. 1 (1985) to the force used to terminate the serious risk of death posed by a high-speed pursuit. Based on the reasoning of the Eleventh Circuit, law enforcement officers have **no** discretion under the Fourth Amendment to pursue and seize reckless and dangerous drivers, even where there are felonious violations of traffic laws.

In essence, the Eleventh Circuit's decision prohibits the use of force to terminate the serious risk posed of death posed by a reckless and dangerous

driver. Thus, law enforcement officers are forced into the untenable position of waiting until a fleeing suspect engaged in reckless and dangerous driving, i.e. violating state traffic laws, actually maims or kills an innocent bystander before initiating a seizure. As addressed below, this result defies Supreme Court precedent and creates a split in the circuits.

Moreover, given that **every** high-speed pursuit involves violations of state traffic law, the Eleventh Circuit decision has far reaching public policy implications that cries out for review by this Court. If left unreviewed, the Eleventh Circuit's decision will have a chilling effect on seizures of **all** fleeing suspects across the nation, not only in Alabama, Florida, and Georgia.

1. High-Speed Pursuit Giving Rise To Case

As the pursuit was captured on videotape[1], there are few material issues of fact. Scott, however, urges the Court to review the videotape in order to truly appreciate the rapidly evolving circumstances from the perspective of the officers on the scene.

On March 29, 2001, at approximately 10:42 p.m., Deputy Clinton Reynolds of the Coweta County Sheriff's Office flashed his light to alert a driver that he was traveling almost 20 miles per hour over the speed limit. (R. 49, Reynolds Depo., pp. 72-73 and 75). When the driver failed to respond, Reynolds activated his

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[1] References to the video recording from the two vehicles are denoted by vehicle number (No. 78 for Reynolds, No. 66 for Scott) with the time as reflected on the video counter.

blue lights. Instead of stopping, the vehicle picked up speed (R. 49, Reynolds Depo., pp. 73 and 76) and headed toward residential and commercial districts of Peachtree City, Georgia.

The fleeing vehicle reached speeds in excess of 100 miles per hour on a two-lane road, and passed other motorists by crossing over double yellow traffic control lines in the process. (R. 36, Exhibit A, 78-22:42:48; 78-22:44:09; R. 49, Reynolds Depo., p. 50, Exhibit 6). The vehicle also ran through a busy red light by passing several vehicles in the turning lane that were stopped at the light. (R. 36, Exhibit A, 78-22:44:36; R. 49, Reynolds Depo., p. 50, Exhibit 6).

Reynolds radioed dispatch that he was pursuing a fleeing vehicle. He did not know the driver's identity. (R. 49, Reynolds Depo., p. 81; R. 48, Scott Depo., p. 115). Scott responded with backup assistance. (R. 36, Exhibit A, 66-22:43:01; R. 49, Reynolds Depo., p. 82; R. 49, Scott Depo., p. 118).

As the vehicle headed towards downtown Peachtree City, the fleeing vehicle continued to travel on the wrong side of the road while passing other motorists on double yellow traffic control lines at a high rate of speed. (R. 36, Exhibit A, 78-22:45:26; 78-22:45:28; 78-22:45:32; 78-22:45:37; and 78:22:45:43).

After the pursuit crossed into Peachtree City, the fleeing vehicle swerved into a shopping center parking lot near a drugstore. (R. 36, Exhibit A, 78-22:46:02; Reynolds Depo., p. 87). With two Peachtree City police vehicles joining in, the fleeing vehicle weaved through the shopping complex, while Scott

proceeded around the opposite side of the complex to block the exit. (R. 52, Brown Depo., pp. 8 and 14; R. 36, Exhibit A, 66-22:46:39; 66-22:46:39; R. 49, Reynolds Depo., pp. 87-88 and 91-92; R. 48, Scott Depo., pp. 171-73). Although he was boxed-in by three law enforcement vehicles (R. 38, Harris Depo., p. 103), the driver collided with Scott's vehicle and escaped onto Highway 74. (R. 36, Exhibit A, 78-22:46:20; 78-22:46:23; and 66-22:46:57)

Despite being pursued by four law enforcement officers from two separate jurisdictions, the vehicle proceeded south on Highway 74, once again at speeds approximating 90 to 100 miles per hour. (R. 49, Reynolds Depo., p. 112 and Exhibit 6). He continued to pass vehicles while crossing over double yellow control lines, and raced through more controlled intersections, including a red light. (R. 36, Exhibit A, 66-22:47:49; 78-22:46:56; 66-22:47:55; 66-22:48:28).

Given the perceived increased and ongoing danger to the public, the deputies decided to raise the level of force. (R. 49, Reynolds Depo., p. 114; R. 48, Scott Depo., pp. 186-187; R. 50, Depo. of Fenninger, pp. 54-56 and Exhibits 4 and 6). Scott obtained approval from his supervisor, Sgt. Mark Fenninger, to make physical contact with the vehicle in what is termed a "PIT" ("Precision Intervention Technique") maneuver. (R. 36, Exhibit A, 79-22:47:35; R. 48, Scott Depo., pp. 143-44; R. 50, Depo. of Fenninger, p. 53). Due to the high rate of speed, Scott backed off at the last moment and instead slowed his vehicle and tapped the rear bumper of the vehicle with his push bumper. (R. 48, Scott Depo., pp. 146-47). **Scott decided to make this contact while no other motorists appeared to be in**

the immediate area to prevent an accident with innocent motorists. (R. 48, Scott Depo., p. 147).

After the vehicles made contact, the fleeing suspect lost control of his vehicle and left the roadway, ending the pursuit. (R. 36, Exhibit A, 66-22:48:47). It was only then that the officers learned the driver's identity was Victor Harris. (R. 50, Depo. of Fenninger, Exhibit 5).

The entire pursuit covered approximately nine miles, and lasted approximately six minutes. (R. 36, Exhibit A; R. 49, Depo. of Reynolds, p. 78). Although Harris, who was unbelted, was rendered a quadriplegic (R. 38, Depo. of Harris, pp. 166-68), he fortunately survived, and no officer or innocent bystander were harmed as a result of his reckless and dangerous driving. **Indeed, even Harris and his own expert agree that his driving was reckless and a danger to the public.** (R. 38, Harris Depo., pp. 127, 129, 138; R. 37, Alpert Depo., pp. 68-69, 71-72, 74-85).

2. District Court Proceedings

Even though Harris crossed double yellow lines, ran through stop signs and traffic lights and collided with a police vehicle before he was ultimately stopped, the district court found the "underlying crime" of speeding meant the force used by Scott was not "in proportion" to the risk posed. Appendix at 40a-41a. Based on this, the district court denied Scott qualified immunity. Appendix at 41a-42a.

3. Decisions of the Eleventh Circuit

Scott appealed the district court's denial of qualified immunity. The Eleventh Circuit affirmed, finding that Harris' reckless driving did not provide "probable cause to believe that he posed a substantial threat of imminent physical harm to motorist and pedestrians." *Harris v. Coweta County*, 406 F.3d 1307, 1316 (11th Cir. 2005). The court also denied qualified immunity because it found that the "*Garner* requirements for the use of deadly force were [not] present when Scott rammed Harris." *Id.* at 1318.

Scott timely filed a petition for rehearing *en banc*, based on the panel's explicit overruling of Eleventh Circuit *en banc* precedent and misapplication of Supreme Court pronouncements. The petition was not resolved; instead, the panel decided to "*sua sponte*" grant rehearing, after which it reached the identical outcome on identical reasoning. *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005). The reissued decision is essentially the same, with the exception of section B where the panel expounded on the same discussion of the *Garner* standard that was presented in the first decision. Appendix at 15a-22a.

REASONS FOR GRANTING OF THE PETITION

A writ of certiorari is warranted because the Eleventh Circuit decision creates a split among the circuits that have considered the underlying constitutional question of whether a law enforcement officer violates a fleeing suspect's Fourth Amendment rights by using deadly force to terminate a dangerous high-speed pursuit. The decision also conflicts with

decisions of other circuits and this Court that have held that qualified immunity protects officers from liability for Fourth Amendment violations unless the officer had "fair and clear warning" that his conduct violated clearly established rights. Finally, this case has significant public policy implications because it essentially creates strict liability if an officer uses force to terminate a pursuit before the fleeing suspect has an opportunity to kill or seriously injure an innocent bystander.

I. THE DECISION CREATES A SPLIT IN THE CIRCUITS BY CONCLUDING THAT SCOTT'S DECISION TO USE DEADLY FORCE TO TERMINATE THE HIGH-SPEED PURSUIT COULD VIOLATE THE FOURTH AMENDMENT

The Eleventh Circuit's denial of qualified immunity contradicts every other court that has considered the same Fourth Amendment issue, and thus creates a split among the circuits on the use of force to terminate the serious risk of death posed by the reckless and dangerous driving of a vehicular pursuit. Every other circuit has held that the Fourth Amendment is not violated under similar circumstances

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). "If a constitutional right would have been violated under the plaintiff's version of the facts, 'the next, sequential step is to ask whether the right was clearly

established.'" *Saucier*, 533 U.S. at 201. Stated another way, "the salient question" is whether the state of the law at the time of this incident gave a defendant "fair and clear warning" that his conduct with respect to plaintiff was unconstitutional. *Hope*, 536 U.S. at 746 (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

Under the threshold inquiry, the Eleventh Circuit's decision conflicts with Supreme Court precedent that requires courts to judge an officer's use of force from the perspective of the officer on the scene. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court cautioned courts to view police force from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396-9.

In an apparent violation of *Graham*, the Eleventh Circuit viewed the facts from the perspective of the fleeing driver **and** with the benefit of hindsight by focusing on Harris' initial traffic offense of speeding and the fortuitous outcome of no resulting injuries to bystanders.[2] **Here, even Harris and his own expert agree that his driving was reckless and a danger to the public**. (R. 38, Harris Depo., pp. 127, 129, 138; R. 37, Alpert Depo., pp. 68-69, 71-72, 74-85). That Scott made contact at a point when he did not know if Harris was about to mow someone down does not mean that the risk was over. From Scott's perspective, there easily could very well be another motorist (or pedestrian) in Harris' path, just over the next hill or around the next curve. Indeed, Scott made the split-

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[2]In addition, it appears the Eleventh Circuit reasoned that a speeding violation alone does not warrant the use of deadly force in light of the severity of Harris' injury.

second decision to terminate the pursuit when no other motorists appeared to be in the area in order to avoid an accident. (R. 48, Scott Depo., p. 147 ("there was either a – a red light or a vehicle ahead of us and I needed to get that car stopped now while there was nobody around, so I decided to made direct contact with the vehicle with my push bumper").

Under *Graham*, the proper question should be whether the information known by Scott **at the time** allowed him to reasonably believe that the fleeing driver posed a risk of death or serious bodily harm to the public. Common sense dictates that driving on the wrong side of the road at a high rate of speed and racing through red lights and stop signs can cause death or serious bodily harm to the public (despite the use of turn signals).[3] *See, e.g., Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004) (fleeing suspect that sped up to 75 miles per hour "placed officers' lives and innocents' lives in danger thereby justifying use of force); *Pace v. Capobianco*, 283 F.3d 1275, 1281 (11th Cir. 2002) (deadly force (shooting) authorized after fleeing suspect turned in front of an officer, swerved at officers coming from opposite direction, almost hit a motorist head-on, and drove 50-60 miles per hour through private property); *see also Durrance v. Georgia*, 549 S.E.2d 406, 408 (Ga. Ct. App. 2001) (intent to commit felonious assault evidenced where fleeing suspect "had crossed the centerline and

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[3]The panel's violation of *Graham* is perhaps most evident in its conclusion that Harris' use of his turning signal when he drove on the wrong side of the road proved he was not a danger to the public. App. at 12a. A blinking turning signal would be of little solace to the injured or killed passenger of an oncoming vehicle.

was speeding").

The Sixth and Eighth Circuits have also held that law enforcement officers may use deadly force when a fleeing suspect appears likely to drive in a manner that places the officer or others at risk. *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (after fleeing car crashed into a guardrail, officer shot into car as it began to resume a high speed flight); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (officer shot suspect after brief stop where suspect had appeared "trapped" at end of street); and *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (held, decision to shoot driver of speeding tractor-trailer truck who had made multiple dangerous maneuvers toward officers and other motorists did not violate the Fourth Amendment). In all these decisions, the court was rightfully concerned with providing the officer on the street with the discretion to make split-second decisions instead of second-guessing the decision with the benefit of 20/20 vision of hindsight. As succinctly stated by the Sixth Circuit:

> We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, supra at 347.

Contrary to the common sense reasoning of its sister circuits, the Eleventh Circuit decision **requires**

law enforcement officers to either call off the pursuit and allow the fleeing suspect to drive as recklessly as he desires **or** wait until the fleeing suspect actually injures or kills a bystander before initiating a "seizure" to terminate the pursuit. The conundrum that will heretofore result from the Eleventh Circuit decision defies common sense, as either scenario would exponentially **increase** the harm to the public that law enforcement officers are sworn to protect. This result is simply untenable.

II. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S QUALIFIED IMMUNITY PRECEDENT

In addition to creating a split in the circuits, the Eleventh Circuit decision is contrary to this Court's precedent in its inexplicable result in the second step of the qualified immunity analysis. The Eleventh Circuit essentially held that the general deadly force standard of *Garner* was sufficient to provide "fair and clear warning" that Scott's use of force to end Harris' undisputed reckless and dangerous driving violated clearly established law.

The second inquiry of the qualified immunity analysis asks whether the law was so "clearly established" at the time of the incident that every reasonable officer would know his conduct violated the Fourth Amendment. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (if "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized"). The standard for qualified immunity reasonableness, however, is quite different from the substantive *Graham* reasonableness inquiry:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205. The Court then summed up the distinction between the *Graham* and qualified immunity reasonableness standards as follows:

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment, . . . *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis applies in excessive force cases, where in addition to the deference officers received on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

In the first decision, the Eleventh Circuit denied qualified immunity on ground that the general *Garner*

standard alone "applies with 'obvious clarity'" to defeat Scott's claim of qualified immunity. 406 F.3d at 1307. On rehearing, the panel retreated from this stance by concluding that it "need not conclude that the facts in *Harris* present just such an 'obvious' case to deny Scott qualified immunity," but then proceeded to again deny qualified immunity based on *Garner* alone. App. 19a. In so ruling, the panel acknowledged that "every objectively reasonable police officer" in Scott's position would need to have known that Harris' reckless driving did not pose a "significant threat of death or serious physical injury"; "that an automobile can be used as deadly force"; and "that deadly force cannot be used in the absence of the *Garner* preconditions." App. at 17a-18a.

Distilled to its essence, the cases cited by the Eleventh Circuit reveals that the general tests enunciated in *Garner* and *Graham* serve as the **sole** basis for finding that Scott had "fair and clear" warning that his conduct was unconstitutional. Id. The panel so ruled even though the Court cautioned that the *Graham* and *Garner* tests are "cast at a high level of generality" because they follow "the lead of the Fourth Amendment's text." *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004). Thus, in *Saucier v. Katz*, the Court noted:

> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law

> must be elaborated from case to case. **Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (C.A. 11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.**

533 U.S. 194, 205-06 (2001) (emphasis added).

Under the Court's qualified immunity precedent, the Eleventh Circuit's denial of qualified immunity based on the broad parameters of *Graham* and *Garner* is questionable at best given the rapidly evolving and volatile circumstances that Harris himself created by continuing to evade arrest at the risk of great harm to the public. Moreover, there has been **no** decision from this Court or any other circuit that addresses the use of push bumpers to terminate a pursuit.

Given the absence of clearly established law, Scott certainly had at least "**arguable probable cause**" in light of the information he possessed that Harris posed a threat of immediate harm to the public. Indeed, the Eleventh Circuit's conclusion that an automobile can be used as deadly weapon applies equally to Harris' reckless driving to support a finding of qualified immunity. To begin and end the qualified immunity analysis with *Garner*, despite Harris' admission of reckless and dangerous driving, effectively eliminates the application of qualified immunity to police pursuit cases.

III. THIS CASE HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS FOR LAW ENFORCEMENT IN PURSUIT CASES

The Eleventh Circuit decision evinces a policy preference that law enforcement officers should allow reckless and dangerous drivers to escape if the underlying violation consists of a traffic law violation. This policy undermines the very purpose of traffic laws, i.e. to protect the lives of the motoring public. Certainly, there may be circumstances when allowing a suspect to escape is preferable; but if the escape itself puts others at serious risk of harm, officers should be given the **discretion** to use force to terminate the risk and protect innocent bystanders. Indeed, the ability to exercise discretion to combat the threat of serious injury or death to others is at the very heart of qualified immunity. As stated by this Court, qualified immunity should provide an "accommodation for reasonable error," and " 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

As noted, the facts of this case are a compelling demonstration of the reason for the qualified immunity doctrine. Scott was forced to make the split-second decision of whether to terminate the pursuit through a seizure or do nothing and run the risk that Harris' **continued** reckless and dangerous driving would seriously injure or kill an innocent bystander. This situation was not of Scott's making, and he had to make a split-second choice without the luxury of a second chance. Whatever the choice, death or serious bodily injury to someone could certainly have followed.

CONCLUSION

Particularly given the significance of the case for the law enforcement community-- above and beyond simply the interests of the parties to this lawsuit -- the Court should grant *certiorari* review. The orderly administration of justice, and the gravity of the implications of the decision nationwide, demands no less than the Court's attention.

For the foregoing reasons, Scott respectfully requests that the decision of the Eleventh Circuit denying qualified immunity be summarily reversed, or alternatively, that a writ of certiorari be granted.

Respectfully submitted,
PHILIP W. SAVRIN
Counsel of Record
Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000
Attorneys for Petitioner

(any footnotes trail end of each document)

No. 03-15094

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VICTOR HARRIS,
Plaintiff-Appellee,

Versus

COWETA COUNTY, GEORGIA, et al.,
Defendants,

MARK FENNINGER, Sgt., TIMOTHY C. SCOTT,
Deputy, Defendants-Appellants.

December 23, 2005, Decided

December 23, 2005, Filed

COUNSEL: For Sgt. Mark Fenninger, Appellant: Philip Wade Savrin, FREEMAN, MATHIS & GARY, LLP, ATLANTA, GA.

For Victor Harris. Appellee: Andrew C. Clarke, Attorney at Law, Memphis, TN.

JUDGES: Before BIRCH, BARKETT and COX, Circuit Judges.

OPINIONBY: BARKETT

OPINION: ON PETITION FOR REHEARING

BARKETT, Circuit Judge:

We sua sponte grant rehearing in this case, vacating our prior opinion, 406 F.3d 1307 (11th Cir. 2005), in its entirety and substituting the following in its place.

Coweta County Deputy Timothy Scott ("Scott") and Coweta County Sergeant Mark Fenninger ("Fenninger") appeal from the denial of summary judgment on their claims of qualified immunity on Victor Harris' ("Harris") 42 U.S.C. § 1983 action based on Harris' allegations that Scott violated his Fourth Amendment rights by using excessive force during a high-speed car chase, and that Fenninger violated his Fourth Amendment rights by authorizing that use of force.

I. BACKGROUND

Viewed in the light most favorable to the non-movant, Harris, the facts pertaining to the chase that covered approximately nine miles and lasted approximately six minutes are as follows. Between 10:30 and 11:00 pm on March 29, 2001, a Coweta County deputy clocked Harris' vehicle at 73 miles per hour in a 55 mile-per-hour zone. The vehicle that Harris was driving was registered in Harris' name and at his proper address. Although the deputy flashed his blue lights, Harris continued driving. The deputy pursued, and in attempting to flee, Harris drove in excess of the speed limit, at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes, and ran through two red lights. Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements.

After Harris refused to stop, the deputy radioed dispatch and reported that he was pursuing a fleeing vehicle, and broadcast its license plate number. He did not relay that the underlying charge was speeding. Scott heard the radio communication and joined the pursuit, as it proceeded toward the county line into Fayette County, Georgia.

After crossing into Peachtree City in Fayette County, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex, where two Peachtree City police vehicles were already stationed. Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74, driving his vehicle directly into Harris' path. Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came into contact with each other, causing minor damage to Scott's cruiser.[1] Harris then entered Highway 74 and continued to flee southward at a high speed.

Through Peachtree City, Scott took over as the lead vehicle in the chase. After getting on Highway 74, Scott radioed a general request for "Permission to PIT him." A "PIT" ("Precision Intervention Technique") maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop.[2] Harris' expert's report attests that "national law enforcement standards require than [sic] an officer be trained in all deadly force applications before being permitted to use those applications." R. 24, at 9-10. Scott had not been trained in executing this maneuver. He and the other Coweta

officers did not undergo a training on PITs until after the incident.

Fenninger was the supervisor who responded to Scott's radio call and granted Scott permission to employ the PIT, telling him to: "Go ahead and take him out. Take him out." Fenninger--who tuned into the transmissions about the pursuit late--did not know how the pursuit originated, the speeds of the vehicles, the numbers of motorists or pedestrians on the roadways, or how dangerously Harris was driving. Fenninger also did not request further details about the pursuit prior to authorizing the PIT.

After receiving approval, Scott determined that he could not perform the PIT maneuver because he was going too fast. Instead, however, he rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash. As a result, Harris was rendered a quadriplegic.

II. STANDARD OF REVIEW

We review the denial of summary judgment de novo. *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003). In conducting our review, we apply the same legal standards as the district court. *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003). Thus, we view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor. Id. Summary judgment is not appropriate unless the evidence demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.P. 56(c)).

A defendant's entitlement to qualified immunity is a question of law, also to be reviewed de novo. *Cagle*, 334 F.3d at 985.

III. DISCUSSION[3]

As we have often stated, "qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (internal citations and quotation marks omitted). This immunity "allow[s] government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation[.]" Id. (citing *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Thus, in order to receive its protections, the government official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). In this case, there is no dispute that when Scott rammed Harris' vehicle during the high-speed pursuit on March 29, 2001, he did so as part of his discretionary functions as deputy of the Coweta County Sheriff's Department (CCSD). It is likewise clear (and uncontested) that Fenninger's authorization of Scott's use of a PIT maneuver was a decision made in his capacity as supervisor to Scott and sergeant of the CCSD.

The defendants having established their eligibility for qualified immunity, the burden then shifts to the plaintiff to show that qualified immunity is not appropriate. *Lee*, 284 F.3d at 1194. This next step consists of a two-part inquiry, set forth in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). First we ask, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. If, assuming the plaintiff's allegations were true, no such right would have been violated, the analysis is complete. However, if a constitutional violation can be made out on the plaintiff's facts, we then must determine "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal law." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278-79 (11th Cir. 2004) (citing *Saucier*, 533 U.S. at 201-02, 121 S. Ct. 2151). We address these questions in turn.

A. Did Scott and Fenninger Violate Harris' Constitutional Right To Be Free From An Unreasonable Seizure?

Harris alleges that Scott violated his Fourth Amendment right to be "free from the use of excessive force in the course of an investigatory stop or other 'seizure' of the person." *Kesinger*, 381 F.3d at 1248 (citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). To establish an excessive force claim, Harris must show first that he was subjected to a "seizure" within the meaning of the Fourth Amendment. *Vaughan*, 343 F.3d at 1328.

The district court concluded, and Scott does not contest, that Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash. Pursuant to *Brower v. County of Inyo*, 489 U.S. 593, 596-99, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989), using a vehicle to stop and apprehend a suspect is a seizure. In Brower, the Supreme Court held that a fleeing suspect who fatally crashed into a so-called "deadman" roadblock[4] during a high-speed chase had been "seized" by the police who set up the roadblock.[5] The Court defined a seizure as "a governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 597, 109 S. Ct. 1378 (emphasis omitted). The Court reasoned that "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result ... Brower was meant to be stopped by the physical obstacle of the roadblock--and ... was so stopped." *Id.* at 599, 109 S. Ct. 1378. The Court noted that if "the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure." *Id.* at 597, 109 S. Ct. 1378. See also *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003) ("As we have held, a Fourth Amendment seizure occurs as a result of a car collision only where the police officer intended the collision to be the result."); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949 (7th Cir. 1994) (finding a Fourth Amendment "seizure" where officer intentionally backed up squad car into the path of a fleeing motorcycle and provoked collision, sending both driver and passenger airborne).

Having determined that Harris was seized, we turn to the question of whether the force used by Scott to

effectuate the seizure was reasonable, in light of the facts according to Harris.[6] In *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Supreme Court made clear that the reasonableness of a seizure "depends on not only when a seizure is made, but also how it is carried out." In Garner, as in this case, the Court considered a suit for damages under 42 U.S.C. § 1983 on the grounds that the manner of the seizure violated Garner's constitutional rights. The police argued that because Garner was a fleeing felon, any force necessary to capture him was permissible. The Supreme Court held that the use of deadly force may not be used to seize a fleeing felon "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3, 105 S. Ct. 1694 (emphasis supplied). The Court concluded that:

> the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11, 105 S. Ct. 1694.

The Court recognized that limited circumstances might justify the use of deadly force, to wit: (1) "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm," and (2) if deadly force is "necessary to prevent escape," and, (3) "if, where feasible, some warning has been given." *Id.* 471 U.S. at 11-12, 105 S. Ct. 1694. See also *Vaughan*, 343 F.3d at 1329-30. Without meeting all of these conditions, the use of deadly force is constitutionally unreasonable.

"Deadly force" is force that creates "a substantial risk of causing death or serious bodily injury." *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n. 10 (11th Cir. 1985) (citing Model Penal Code (MPC) § 3.11(2) (1962)).[7] The Coweta County Sheriff Department's Use of Force Policy provides an analogous definition - "force which, under the circumstances in which it is used, is readily capable of causing death or other serious injury." R. 48 at Ex. 12, at 82. In Pruitt, we found that shooting a suspect in the legs to stop him was a "use of deadly force" in the constitutional sense, even though the officer did not necessarily shoot to kill. We reasoned that the MPC and Alabama Code definitions of deadly force "clearly encompassed" the force used in that case because "[the officer], at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury." 771 F.2d at 1479 n. 10.

Like other instrumentalities, the use of an automobile

cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately to cause death or serious bodily injury. See *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (suspect "used the automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which [suspect] was armed"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon.' ... An automobile has been held to constitute a deadly weapon when used to run down a law enforcement officer. Likewise, in this instance appellants' boat, used in an attempt to ram the vessel of Customs officials, also could properly be considered a deadly weapon.") (internal citations omitted). See also *Hernandez*, 340 F.3d at 624 (officer had probable cause to shoot suspect where suspect "posed an imminent threat of serious physical harm to himself and to others as evidenced by [suspect's] driving head-on into [the officer's] vehicle"); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (citing *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990)) ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon."). Cf. *Brower v. County of Inyo* 884 F.2d 1316, 1317-18 (9th Cir. 1989) (assuming without deciding that deadman roadblock to stop a fleeing vehicle during a high-speed chase was an application of

"deadly force" and applying Garner analysis).

Under an objective view of the facts of this case, there is little dispute that the ramming of Harris' car could constitute a use of "deadly force" and that a jury could so reasonably conclude.[8] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("The judge's inquiry [at the summary judgment stage], therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."). Moreover, none of the limited circumstances identified in Garner that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11-12, 105 S. Ct. 1694. Indeed, neither Scott nor Fenninger had any idea why Harris was being pursued. The use of deadly force is not "reasonable" in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest. *Vaughan*, 343 F.3d at

1330. The Garner Court specifically recognized that it would be an anomaly to transform "every fleeing misdemeanant into a fleeing felon ... solely by virtue of his flight." 471 U.S. at 10 n. 9, 105 S. Ct. 1694.[9] A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the "substantial threat" of imminent physical harm that Garner requires before deadly force can be used. Garner made clear that "it is not better that all ... suspects die than that they escape." 471 U.S. at 11, 105 S. Ct. 1694.[10]

We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists of the road. Cf. *Pace*, 283 F.3d at 1282 (officer had probable cause to believe that car had become a deadly weapon with which defendant was armed where suspect drove through residential neighborhood at 50 to 60 mph, swerved at oncoming police cars, nearly hit elderly motorist head-on when driving on wrong side of road, and accelerated towards police car roadblock forcing officer off of the road to avoid collision); *Cole v. Bone*, 993 F.2d 1328, 1331-1334 (8th Cir. 1993) (deadly force was reasonable to stop high-speed chase where truck forced more than one hundred cars off the road or out of the truck's way and endangered the lives of many other motorists during the pursuit, chase lasted 50 miles, and officers

attempted to slow the vehicle using several types of roadblocks). Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[11]

Nor can we countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase. The Supreme Court rejected such an argument in Brower, where it was suggested that the plaintiff in that case "had a number of opportunities to stop his automobile prior to the impact" and thus, could have avoided his own injuries. *Brower*, 109 S. Ct. at 1380-81 (citation omitted). Justice Scalia noted that essentially the same thing could have been said about the suspect in Garner, that is, the plaintiff's "independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." Id. at 1381.

We conclude that ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated Harris' Fourth Amendment rights.

With respect to Fenninger, however, we cannot come to the same conclusion. Although the use of deadly force cannot be authorized under Garner without knowing that the Garner conditions have been met, the facts of this case do not establish that Fenninger authorized deadly force. Rather, the evidence shows that Fenninger authorized a PIT--defined by the district court as "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight "safely." See, e.g., Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speeds on wide straightaways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT "is not applicable in every situation, the key to its effective use is to carefully choose a favorable spot before attempting PIT and to first consider the possible effects on other traffic and pedestrians"); National San Diego Police Department Use of Force Task Force Recommendations, Executive Summary at 37 ("Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible."). Scott, however, chose not to execute a PIT at all, but rather to ram the car at a very high speed from behind. Because this ramming was not authorized by Fenninger, we cannot say that Fenninger's conduct -

authorization of a safe PIT that was not executed - violated Harris' constitutional rights. Thus, since Fenninger is not liable for a constitutional violation, summary judgment should be granted in his favor. The district court's ruling as to Fenninger is therefore reversed.

B. Is Scott entitled to qualified immunity?

Having determined that a jury could have reasonably found the violation of a constitutional right by Scott, we now ask whether the law as it existed on March 29, 2001, was sufficiently clear to give reasonable law enforcement officers "fair notice" that ramming a vehicle under these circumstances was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). "The essence of qualified immunity is notice." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003) (citing *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

For at least twenty years, since Garner was decided, officers have been on notice that they may not use deadly force to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury. See *Garner*, 471 U.S. at 11-12; see also *Garner*, 471 U.S. at 10-11 ("the fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). Moreover, prior to the incident in question the law was clearly established that an automobile, like a gun, could be used as a deadly instrument. See also *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (concluding that fleeing felon in 1998 had used car in a

way that made it a "deadly weapon"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon'" concluding that appellants' boat, used in an attempt to ram the vessel of Customs officials, [could] . . . properly be considered a deadly weapon.") (internal citations omitted).[12]

It was also clearly established at the time of the instant circumstances that the Fourth Amendment requires a seizure of a fleeing suspect to be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force. *Garner*, 471 U.S. at 8, 11-12 (holding that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable... A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"; "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out") (emphasis added); *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989). See *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (requiring reasonableness of seizure based on the circumstances, including scope and intensity of seizure); *United States v. Ortiz*, 422 U.S. 891, 895, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) (same); *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997) (holding Fourth Amendment violated if seizure occurred and force used to effect the seizure was unreasonable); see generally *Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005) (holding that in 2002 there was a "clearly

established principle that deadly force cannot be used in non-deadly situations.").[13]

Impacting our review of reasonableness is a "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue." *Graham*, 490 U.S. at 396 (emphasis added); *Lee v. Ferraro*, 284 F.3d 1188, 1197-98 (11th Cir. 2002) (denying qualified immunity to officer on excessive force claim partially because of low level of plaintiff's offense; "Graham dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime ...."); *Jackson v. Sauls*, 206 F.3d 1156, 1170 n. 18 (11th Cir. 2000) ("A court may also factor in 'the severity of the crime ....'") (quoting *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) (same); see generally *United States v. Kaplan*, 286 F. 963, 974 (D.C. Ga. 1923) (holding that "in the case of a misdemeanor, the general rule that an officer has no right, except in self-defense, to kill the offender to effect his arrest, and that the 'killing of a fleeing person under such circumstances would amount to murder.'"); *King v. State*, 91 Ga.App. 825, 828, 87 S.E.2d 434 (Ga. App. 1955) ("no arresting officer has any right to kill a person for trying to escape in the commission of a misdemeanor").

Thus, by 2001 the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the Garner

preconditions.

The establishment of these principles distinguishes this case from *Brosseau v. Haugen.* In Brosseau, the Supreme Court reversed the denial of qualified immunity to an officer sued for Fourth Amendment violations under § 1983 for shooting a suspected felon as he attempted to flee in a vehicle, where the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area.[14] Unlike Harris, Haugen, the suspect in Brosseau, was a suspected felon with a no-bail warrant out for his arrest, with whom Brosseau, the officer, had a violent physical encounter prior to the shooting. Believing that Haugen had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep, and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity - the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere nearby), a woman and her 3-year-old child in a small vehicle parked directly in front of the Jeep and 4 feet away, and two men in a parked vehicle 20 to 30 feet away. In addition, prior to shooting, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit Haugen in an attempt to get the keys.

Looking to Garner, the Brosseau Court recognized that its clearly established deadly force rule (i.e., that "it is

unreasonable for an officer to 'seize an unarmed non dangerous suspect by shooting him dead'") was limited by the Court's further instruction that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 598, 160 L. Ed. 2d 583 (quoting *Garner*, 471 U.S. at 11, 105 S. Ct. 1694). Thus, the Brosseau Court held that Garner did not provide a reasonable officer with fair notice of a Fourth Amendment violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 600 (emphasis supplied).[15]

Scott also argues that Garner does not apply because in that case, the officer applied the deadly force with a gun. Scott relies on our holding in Adams that in 1985, the caselaw was insufficiently developed to give notice to every objectively reasonable officer that a police car ramming another car during a high-speed pursuit would constitute an unreasonable seizure. However, the facts in Adams occurred before Brower was decided, and thus, at a time before the Supreme Court made clear that the intentional use of a vehicle to apprehend a suspect was a Fourth Amendment seizure. That principle is now settled. Garner made clear that the use of deadly force against an unarmed and nondangerous fleeing felony suspect was unlawful and set out the specific criteria necessary before the application of deadly force is warranted. This law clearly applied to the use of a vehicle to seize a suspect at the time of the incident in this case.

We are satisfied that, under Hope, the requirement that the officers have "fair warning" that their conduct violates a constitutional right through a general constitutional rule, "even through the very action in question has [not] previously been held unlawful," has been satisfied. 536 U.S. at 740-41, 122 S. Ct. 2508 (internal quotation marks and citations omitted). A reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force, n16 could be used to effectuate a seizure, n17 and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set out in Garner existed. *Garner*, 471 U.S. at 11-12, 105 S. Ct. 1694. See also *Vaughan*, 343 F.3d at 1329-30. The Garner Court used the term "deadly force," not "handgun," in enunciating its rule. Garner, 471 U.S. at 11-12, 105 S. Ct. 1694 ("Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used ...") (emphasis supplied). Moreover, the opinion recognizes the obvious principle that "deadly force" can be inflicted through other means. *Id.* at 14, 105 S. Ct. 1694 (observing that in times when weapons were rudimentary, "deadly force could be inflicted almost solely in a hand-to-hand struggle ..."). See *Vaughan*, 343 F.3d at 1332 ("the Supreme Court in Hope cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration"). See also *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (applying Garner "deadly force" rule to determine whether officers were qualifiedly immune for hog-tying suspect).

By 2001, it was well-established in this circuit that "deadly force" means force that creates a substantial risk of causing death or serious bodily injury. *Pruitt*, 771 F.2d at 1479 n. 10. The CCSD policy in 2001 employed a near-identical definition. Moreover, by 1986, we had recognized the potentially lethal nature of an automobile. See *Gualdado*, 794 F.2d at 1535, and other cases cited on pages, supra.

We are also satisfied that common sense would inform any reasonable officer that there would be substantial risks of death or bodily harm if he used his vehicle to ram another vehicle at high speeds in the manner employed in this case. See CCSD Use of Force Policy, R. 48, Ex. 12 at 82 (restricting the use of deadly force to "when the Deputy reasonably believes it is necessary to defend their [sic] own life or the life of another or to prevent grave bodily injury to themselves [sic] or another, and all other available means of defense have failed or would be inadequate or dangerous," or "when necessary to prevent the commission of ... any felony which involves the use or threat of physical force or violence against any person."). See also Ga.Code Ann., § 17-4-20(b) ("Sheriffs and peace officers ... may use deadly force to apprehend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm."); *Garner*, 471 U.S.

at 10-11, 105 S. Ct. 1694 ("The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). Cf. CCSD Pursuit Policy, R. 48, Ex. 11, at 94 (categorizing roadway barricades as the use of deadly force and limiting their use "only by order of a supervisor and then only as a last resort when the person pursued has proven by his method of flight a total disregard for the lives and safety of the public"). See *Vaughan*, 343 F.3d at 1332-33 ("Applying Garner in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to . . . qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment.").

For the foregoing reasons, a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road under the instant circumstances, and we find no reversible error in the denial of qualified immunity to Scott at this stage in this case. n18

Consistent with the above conclusions, the district court opinion is

REVERSED IN PART and AFFIRMED IN PART.

Footnotes

n1 Scott disputes this version of events. For purposes

of summary judgment, we accept Harris' version.

n2 At the time of the chase, the Coweta County Sheriff's Department had a vehicle pursuit policy, which stated that "deliberate physical contact between vehicles at anytime may be justified to terminate the pursuit upon the approval of the supervisor." R. 48, Ex. 11, at 93.

n3 We reject Harris' first argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision.

n4 A deadman or "blind" roadblock is an obstacle (usually a police car or truck) placed on the road in a manner that prevents an oncoming driver who is being pursued by the police from knowing the road is blocked.

n5 This court held in *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923, 923 (11th Cir. 1993) (en banc) that as of 1985 it was not "clearly established" that striking a car during a police chase constituted a seizure. That case was decided before Saucier and did not decide the first question which must be answered in a qualified immunity case pursuant to Saucier: whether a constitutional right had been violated. See *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1577-78 ("To resolve the question of qualified immunity, we need not decide today whether the Fourth Amendment was violated."). In addition, the question in Adams - whether the striking of a car during a police chase constituted a seizure - has been unequivocally answered in the affirmative by the Supreme Court in Brower. See *Brower*, 109 S. Ct. at 1381. Moreover, the fact that

striking the car during the police chase constituted a seizure is not in dispute in this case, as the officer who rammed Harris does not, and could not under the circumstances of this case, contest that he seized Harris.

n6 In applying the test, we must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The reasonableness inquiry is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397, 109 S. Ct. 1865.

n7 In Pruitt we also looked to the Alabama Code, which defined "deadly force" as "force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury." 771 F.2d at 1479 n. 10.

n8 See also Scott's Depo., R. 48 at 157-58, (testifying that ramming Harris' vehicle at high speeds constituted a use of deadly force under the CCSD Deadly Force Policy); Fenninger's Depo., R. 50 at 62-63 (testifying that he gave authorization to make contact with the understanding that he was authorizing the use of deadly force). See also testimony of other Coweta County and Peachtree City officers stating that they considered that ramming a vehicle at 90 mph could constitute a use of "deadly force." Reynold's Depo., R.49 at 118-119; Yeager's Depo., R. 54 at 59; Kinsey's Depo., R. 51 at 44; Ercole's Depo., R. 47 at 37-40.

n9 As recognized in Vaughan:

Under Garner, a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect only when the suspect poses an immediate threat of serious harm to police officers or others. In this case, the danger presented by [the suspects'] continued flight was the risk of an accident during the pursuit. Applying Garner in a common-sense way, a reasonable officer would have known that [ramming a car when both automobiles were] traveling at approximately 80 miles per hour ... would transform the risk of an accident on the highway into a virtual certainty.

343 F.3d at 1332-33.

n10 We recognize that whether or not Harris would have escaped has no bearing on the excessive force analysis, as Garner specifically based its holding on the assumption that a fleeing suspect would escape. 471 U.S. at 11, 105 S. Ct. 1694. We note, however, as did the district court, that there were other means to track Harris down as the pursuing officers had a description of the vehicle as well as the license plate number. We also note that absolutely no warning was given that Scott intended to use deadly force.

n11 Nor does the evidence show that Scott or the other officers were in immediate danger or threatened with imminent harm. Accepting Harris' version of events, Harris did not attempt to ram, run over, side-swipe, or swerve into any of the officers (which might have put their lives in danger in the parking lot), nor did he

attempt any such conduct once he was back on the highway immediately before the seizure. Cf. *Hernandez*, 340 F.3d at 623 (evidence of plaintiff's attempts to intentionally drive his car directly into officer's vehicle supported finding that officer's use of deadly force was reasonable); *Smith*, 954 F.2d at 347 (use of deadly force not unreasonable where suspect "posed a major threat" to officers manning roadblock by driving directly into them on a residential dead-end street and "had proven he would do almost anything to avoid capture").

n12 See also *Hawkins v. City of Farmington*, 189 F.3d 695, 703 (8th Cir. 1999); *Ludwig*, 54 F.3d at 473 (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Sturges v. Matthews*, 53 F.3d 659, 661 n.1 (4th Cir. 1995); *Smith*, 954 F.2d at 347 (citing *Sanchez*, 914 F.2d 1355 ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon.").

n13 To determine the constitutionality of a seizure "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Graham*, 490 U.S. at 396 (citing *United States v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116 (1976)).

n14 These facts are not comparable to those in Harris. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an immediate risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S. Ct. 1694. Unlike the situation in Brosseau, the parties were not in close physical proximity nor had they had a one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from behind in their squad cars. At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a residential neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.

n15 We also note that the Court in Brosseau acknowledged that the standard in Garner can "clearly establish" whether or not the use of deadly force is unconstitutional in an "obvious case." *Brosseau*, 125 S. Ct. at 599; *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("general constitutional rule already identified in the decisional law ... applied with obvious clarity to [his conduct]."). It

is well-established that "general statements of the law" are perfectly capable of giving clear and fair warning to officers even where "'the very action in question has [not] previously been held unlawful.'" *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034); *Vinyard*, 311 F.3d at 1350-51. While we need not conclude that the facts in Harris present just such an "obvious" case to deny Scott qualified immunity, this case may present such circumstances, since the evidence shows that Scott lacked the sufficient probable cause to warrant the use of deadly force. In this way, Harris is more like Vaughan than Brosseau or the cases cited therein. See *Vaughan*, 343 F.3d at 1333 ("applying Garner in a common-sense way" to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit where the suspect posed no immediate threat of harm to police officers or others). In the cases relied upon in Brosseau, the officer had arguable probable cause to believe that the suspects presented an immediate risk of danger to the officers or others. See *Brosseau*, 125 S. Ct. at 600 (citing *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) and *Smith*, 954 F.2d 343). Without the existence of an immediate threat of harm to the officers or others that could justify the officer's probable cause, the Garner rule prohibiting deadly force may apply with "obvious clarity."

n16 See citations on pages, supra.

n17 *Brower*, 489 U.S. at 596-99, 109 S. Ct. 1378.

n18 Scott is not foreclosed from seeking to assert a qualified immunity defense at trial if the facts proven at trial differ from those we consider here for summary

judgment purposes.

9/23/2003
NO. 3:01-CV-148-WBH
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VICTOR HARRIS,
Plaintiff,

v.

COWETA COUNTY, GEORGIA, SHERIFF MICHAEL S. YEAGER, SGT. MARK FENNINGER, DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY SCOTT,
Defendants.

ORDER

Before the Court is Defendants' motion for summary judgment [36]. Also before the Court is Defendants' motion to amend answer [65], which is granted as unopposed. For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

As this case is before the Court on Defendants' motion for summary judgment, the Court must view the facts in the light most favorable to Plaintiff, the non-movant. Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 918 (11th Cir. 1993). Viewed in this light, the following facts emerge.

The chase

At 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's office was stationed on Highway 34 when he clocked Plaintiff Victor Harris's vehicle traveling at 73 miles per hour in a 55 miles-per-hour zone. The vehicle that Harris was driving was registered in Harris's name and at his proper address. Although Reynolds flashed his blue lights, Harris refused to slow down and continued driving. According to Harris, he refused to stop because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car.

Reynolds made a decision to pursue Harris, and followed the vehicle in the direction of Peachtree City, using his flashing lights in an attempt to get Harris to stop. Just past Sullivan Road, Reynolds caught up with Harris and tuned on his lights and siren, which activated his video camera. Harris still refused to stop and then sped up, beginning a high speed chase. Harris admits that during the course of the pursuit, he drove well in excess of the speed limits, passed vehicles on a double yellow line, and ran a red light at the intersection of Highway 34 and Fisher Road. Despite these traffic violations, Plaintiff contends that he used his turn signals when passing or turning, and maintained control over his vehicle.[1]

After Harris refused to stop, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle, and he broadcast its license plate number. Reynolds did not, however, broadcast the underlying charge (speeding). Although not specifically requested to join the pursuit, Coweta County Deputy Chuck Scott heard

Reynolds' radio communication and decided to join the pursuit.

After crossing into Peachtree City, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex. Reynolds followed Harris as he drove through the parking lot toward Highway 74 while Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74. The parties dispute what happened next. According to Harris, Scott drove his vehicle directly into Harris's path, while Reynolds was in pursuit from behind. When he realized that Scott was in his lane of traffic, Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles carne in contact with each other, causing minor damage to Scott's cruiser.[2] Harris then entered Highway 74 and continued to flee at a high speed. At that time, Sgt. Mark Brown of the Peachtree City Police Department ordered his fellow Peachtree City officers to block intersections from cross-traffic.

As the pursuit continued through Peachtree City, Scott took over as the lead vehicle. After leaving the parking lot and getting on Highway 74, Scott requested and obtained approval from his supervisor, Sergeant Mark Fernninger, to make physical contact with Harris's vehicle in what is termed a "PIT" maneuver.[3] Although unaware of the underlying offense of which Harris was suspected, Scott wanted to use the PIT maneuver to end the chase as soon as possible because he felt that Harris was acting in a reckless and extremely dangerous manner. At the time the request was made, there were no motorists or pedestrians in the area,

which was due, in part, to the Peachtree City officers' decision to blockade intersections.

While it is disputed whether Fenninger knew about the collision between Harris and Scott in the parking lot, the evidence indicates that Fenninger was concerned about the safety of pedestrians and felt that Harris had to be stopped. In granting Scott permission to make contact with Plaintiffs vehicle, Fenninger stated over the radio, "Go ahead and take him out. Take him out." According to Harris's version of the facts, Fenninger was never made aware that the pursuit originated with a speeding violation.

After receiving approval from Fenninger to snake contact with Harris's vehicle, Scott determined that he could not perform the PIT maneuver because he was going too fast. Scott then decided to hit Harris's bumper, presumably in a mariner different from a PIT maneuver. The parties dispute whether Scott slowed down or sped up, but they agree that he ran his cruiser into Harris's vehicle, causing Harris to lose control. Harris's vehicle left the roadway, ran down an embankment, and crashed. As a result, Harris was rendered a quadriplegic. No one else was injured.

Coweta County's policies

Under the vehicle pursuit policy of the Coweta County Sheriff's Office in effect at the time of the incident, decisions regarding the initiation, continuation, and termination of pursuits were left to the discretion of the officer and supervisor in the field. Specifically, the policy states that "the pursuing deputy should keep in. mind his personal safety and try everything within his

authority to apprehend the violator without resorting to a high-speed chase." This type of policy, which leaves the decision about pursuits to the discretion of the officer in the field and the supervisor, is called a "judgmental policy." Across the country, a majority of police departments had such judgmental policy in force at the time of the incident involving Harris.

Included in the pursuit policy is a provision that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Additionally, the policy states that the officer should discontinue the pursuit when "upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public" or "upon receipt of additional information once the pursuit has begun that would allow later apprehension and successful prosecution."

Training

It is undisputed that Coweta County Sheriff's Deputies had all of the training required by the State of Georgia, including emergency vehicle operations ("EVOC") training. EVOC training focuses solely on the physical aspects of driving a vehicle in an emergency setting and not on the philosophy of pursuits or pursuit policies. The County also required its officers to have an additional twenty hours of training. The County, however, did not provide any training in high-speed pursuits or the use of deadly force other than that included in basic officer training provided by the state police academy. The only deadly force training provided to Coweta County officers related to firearms.

Although the pursuit policy authorized the deputies to make "deliberate physical contact between vehicles" under certain circumstances, the officers were not trained in how to determine whether to make such contact or in how to safely make such contact. Additionally, Scott admitted that he never received any training on the County's policies and procedures, including the pursuit policy.

The lawsuit

On October 16, 2001, Harris fled a Complaint against Scott, Reynolds, and Fenninger, as well as Coweta County and Sheriff Michael Yeager. Pursuant to 42 U.S.C. § 1983, Harris alleges a violation of his rights under the Fourth and Fourteenth Amendments. Furthermore, under state law, he asserts claims under the Georgia Constitution as well as various common law tort claims.

In his response to the motion for summary judgment, Harris concedes that summary judgment is appropriate on the following claims: all claims against Reynolds, all state law claims against Sheriff Yeager, and all other state law claims except for the negligence and battery claims against Scott, Fenninger, and Coweta County. The Court will address each of the remaining claims in turn.

DISCUSSION

Summary judgment standard

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant carries the initial burden and must show that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,252 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

Defendants' motion

I. Federal Claims

A. Fourth Amendment claim against Defendant Scott

In Count I of his Complaint, Harris alleges that Defendant Scott violated his Fourth Amendment rights by using excessive force to stop his vehicle. "The first step in reviewing an excessive force claim is to determine whether the plaintiff was subjected to the `intentional acquisition of physical control' by a government actor - that is, whether there was a

`seizure' within the meaning of the Fourth Amendment." Vaughan v. Cox, No. 0014380, 2003 U.S. App. LEXIS 18066, at *9-10 (11th Cir., August 29, 2003) (quoting Brower v. Countv of Inyo , 489 U.S. 593, 596 (1989)). The Supreme Court has held that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." Brower, 489 U.S. at 597. It is clear to the Court that the Brower standard has been met in this case. Scott rammed Harris's vehicle for the purpose of stopping it, and the ramming did, in fact, cause the vehicle to come to a stop. A seizure, therefore, occurred.[4]

Having concluded that Harris was subjected to a seizure, the Court now turns to the merits of Harris's Fourth Amendment claim that he was subjected to an unreasonable seizure because of Scott's use of excessive force. Such claims are subject to an objective reasonableness inquiry: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397 (1989). "The `reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20120 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Id. at 396-97.

In their motion, Defendants argue that there was no

constitutional violation because Scott's use of force was non-deadly and was objectively reasonable.[5] They contend that Harris presented a significant danger because he was driving recklessly at high speeds and had hit Scott's vehicle. Plaintiff responds that Scott used deadly force, and that such force was unreasonable because Harris was a traffic offender, and the officers could have used alternative means to arrest him at a later time.

Regardless of whether the force was deadly or not, Harris's excessive force claim is judged by the "objective reasonableness" standard set forth in Graham v. Connor. See 490 U.S. 395.[6] Graham instructs that the Court must examine the facts carefully and provides three examples of questions relevant to the inquiry: (1) how severe was the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was attempting to evade arrest by flight. See Graham, 490 U.S. at 396. Applying the Graham analysis to the facts of this case, the Court concludes that a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force.

The central fact that guides this Court's decision is that, prior to Reynolds' decision to instigate a high-speed chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone. A rational fact finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others. The record does not reflect that he had menaced or was likely to menace others.

Defendants do not address this point in their brief, rather focusing exclusively on Harris's conduct during the chase. The Court is mindful that traffic laws are designed for public safety and that by breaking these laws -- by speeding, improper passing, and even failing to stop – Harris acted in an unsafe manner; however, the record reflects that he maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road. With the exception of the incident with Scott's vehicle in the parking lot, which is addressed below, Harris did not use his vehicle in an aggressive manner.

Defendants argue that the crash in the parking lot between Harris's car and Scott's cruiser demonstrated that Harris presented a significant danger to others. Viewing the facts in Harris's favor, however, it appears that either Scott hit Harris, or that the crash was an accident. According to the official report submitted by Sgt. Mark Brown of the Peachtree City Police Department as well as the testimony of Harris, Scott rammed Harris's car. These facts rebut Defendants' assertion that Harris aggressively used his vehicle to strike Scott's cruiser. Additionally, the decision to ram the vehicle came minutes later, when Harris was driving away from officers, and when there were no other motorists or pedestrians nearby, thus casting doubt on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm to others. Finally, the Court has also considered the fact that the officers had the license plate number for Harris's vehicle, and the vehicle had not been reported stolen. Reasonable officers, therefore, would have known that they could have followed up on the license

plate information at a later time.

Under this version of the facts, a fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force --- ramming the car while traveling at high speeds - was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. See Vaughan, 2003 U.S. App. LEXIS 18066, at * 16 (stating that a reasonable jury could conclude that an officer's use of deadly force against two fleeing suspects was unreasonable where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.") Thus, a fact issue remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris.

Having concluded that the facts alleged could establish a constitutional violation, the Court now turns to Scott's defense of qualified immunity. In deciding whether Scott is protected by qualified immunity, the Court must determine whether Harris's rights were clearly established - that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful. See Saucier v. Katz, 533 U.S. 194, 201-202 (2001). "It is well-settled that a constitutional right is clearly established only if its contours are `sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Vaughan, 2003 U.S. App. LEXIS 18066, at *19 (quoting Anderson v.

Creighton, 483 U.S. 635, 640 (1987)). Thus, "qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful." Lee v. Ferraro, 284 F.3d 1188, 1200 (11th Cir. 2002). The Supreme Court, however, has cautioned that in applying the qualified immunity analysis, courts should not be unduly rigid, but rather should see if the law gave the defendant "fair warning" that the alleged conduct was unconstitutional. See Hope v. Pelzer, 536 U.S. 730, 741 (2002).

At the time of the incident, the law was clearly established that the level of force appropriate in a situation depended, at least in part, on the crime that the fleeing suspect was thought to have committed. See Tennessee v. Garner, 471 U.S.1,11-12 (1985) (setting forth the standard for the use of deadly force to subdue a fleeing felon and recognizing that common law prohibited the use of deadly force to apprehend a misdemeanant); Graham, 490 U.S. at 396 (stating that one of the factors that an officer should consider is the severity of the crime in issue). In the present case, the facts indicate that Scott did not know the underlying charge when he decided to join in the chase or at the time that he rammed the vehicle. Defendants rely heavily upon the crash in the parking lot to show that Harris was dangerous, but the evidence, when viewed in Harris's favor, indicates that a large part of the responsibility for the parking lot incident rests with Scott who deliberately drove into Harris's line of traffic. Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue

of qualified immunity turns which present sufficient disagreement to require submission to a jury. Anderson, 477 U.S. at 25152. Defendants' motion for summary judgment on this claim is DENIED.

B. Fourth Amendment claim against Defendant Fenninger

It is undisputed that, at the time Scott rammed Plaintiff s car, his supervisor, Defendant Fenninger, was miles away from the accident. "Supervisory officials are not liable under section 1983 on the basis of respondent superior or vicarious liability." Hardin v. Hayes, 957 F.2d 545, 849 (11th Cir. 1992). To recover individually from a person such as Fenninger in a supervisory administrative capacity, the plaintiff must show that the supervisor is liable either through personal participation in the acts comprising the alleged constitutional violation, or the existence of a causal connection linking the supervisor's actions with the violation. See Hill v. DeKalb Regional Youth Detention Ctr., 40 F.3d 1176, 1192 (11th Cir.1994) (overruled in part by Hope v. Pelzer, 536 U.S. 730, 739 n.9 (2002)).

Here, Plaintiff argues that Fenninger is liable for the Fourth Amendment violation because he explicitly authorized Scott to use unreasonable force to stop the vehicle, and, therefore, personally participated in the use of excessive force. Defendants respond that Fenninger cannot be held liable because he did not effect a "seizure" of the vehicle.

The evidence shows that Scott requested and obtained approval from Fenninger to make physical contact by executing a PIT maneuver. Fenninger granted

permission without inquiring about the underlying crime for which Harris was being pursued, and without asking whether there were any motorists or pedestrians in the area. Fenninger authorized the force, even though neither he nor Scott were trained in how to safely carry it out. In granting Scott permission to undertake this dangerous act, Fenninger stated over the radio, "Go ahead and take him out. Take him out."

The Court agrees with Plaintiff that, to the extent a jury may find a Fourth Amendment violation on the part of Scott, they may also find that Fenninger is liable because he personally participated in the decision to use the excessive use of force by explicitly authorizing it. The fact that he was not physically present at the scene does not absolve him of liability, since a reasonable inference can be drawn that but for his authorization, Scott would not have struck Plaintiffs vehicle. Defendants' motion for summary' judgment on this claim is DENIED.[7]

C. Fourteenth Amendment claim against Defendants Scott and Fenninger

It appears that Plaintiff brought the Fourteenth Amendment claims as alternatives to his Fourth Amendment claims. See Pl.'s Br. at 16-17 (stating that the Court need not address the Fourteenth Amendment claims if it finds a Fourth Amendment violation). Because the Court has denied Defendants' motion for summary judgment on the Fourth Amendment claims, the Court need not address Plaintiffs Fourteenth Amendment claims, and Defendants' motion for summary judgment with respect to these claims, therefore, is GRANTED.[8]

D. Individual liability against Sheriff Yeager

Plaintiff concedes that Sheriff Yeager did not personally participate in any actions leading to the seizure of Harris, but he contends that Sheriff Yeager may be held liable in his individual capacity for acts or omissions which proximately led to the violation of Harris's rights. Specifically, Plaintiff claims that the Sheriff should have trained his deputies in how to conduct high speed chases; in how to safely effect ramming techniques such as the PIT maneuver, and in how to determine when chases and ramming techniques are appropriate. In some situations, supervisors may be held liable for failing to train and supervise their subordinates adequately. See Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1052 (11th Cir. 1996).

Even assuming, for purposes of this Order, that there was a causal connection between Sheriff Yeager's failure to train and Plaintiffs injuries, this claim fails because the Sheriff is entitled to qualified immunity. The undisputed evidence shows that Coweta County Sheriff s Deputies had all of the training required by the State of Georgia. Plaintiff cites to no law or constitutional right that required Sheriff Yeager to train his employees in the manner suggested by Plaintiff. hi the absence of such authority, Sheriff Yeager is entitled to immunity from suit. See Riley v. Newton, 94 F.3d 632, 637 (11th Cir.1996) (granting to sheriff summary judgment on qualified immunity grounds and distinguishing the qualified immunity standard for failure to train claims from the standard applicable to such claims against municipalities Defendants' motion for summary judgment on this

claim is GRANTED.

E. Municipal liability against Coweta County[9]

In order for Harris to snake out a claim for municipal liability under Section 1983, he must identify a municipal policy or custom that caused his injury. See Grech v. Clan County, 335 F.3d 1326,1329 (11th Cir. 2003). To establish a county policy, a plaintiff may identify either an officially-promulgated county policy or an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county. See id. "Because a county rarely will have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs . . . must show that the county has a custom or practice of permitting it and that the county's custom or practice is the moving force behind the constitutional violation." Id. (internal quotations omitted). Plaintiff has articulated two theories for municipal liability: (1) the County had an unconstitutional policy of engaging in high-speed chases to pursue fleeing offenders which is evidenced by the County's failure to discipline its officers and others involved in similar incidents; and (2) the County's failure to properly train and supervise its officers in the face of an obvious need to train constitutes deliberate indifference to the safety of county residents.

1. Failure to discipline

Harris contends that Coweta County has an informal policy or custom allowing its deputies to engage in high-speed chases and use deadly force in inappropriate circumstances. Plaintiff's expert opined that "the custom and practice of the Coweta County Sheriff's

Office is to ratify and encourage the use of deadly force against fleeing offenders without regard for the underlying offense or the immediacy and severity of the threat posed by the offender." As evidence of this informal policy or custom, Plaintiff relies upon the fact that the officers involved in this case were not disciplined and that Defendants have admitted the officers violated no official county policy. Plaintiff's expert also states that the County was on notice of this problem because of two prior incidents involving a deputy named Cox, who he claims had been involved in two prior pursuits in which deadly force was used against violators who were not suspected of violent felonies.

Defendants respond, and the Court agrees, that Plaintiff has not presented sufficient evidence to male out a claim against Coweta County on this basis. First, Plaintiff has presented no evidence that any officially-adopted policy was unconstitutional. Rather, Plaintiff's evidence is that the County's high-speed pursuit policy, described as a "judgmental policy," is widely used throughout the country, and in fact is adopted by the majority of the jurisdictions.

Second, Plaintiff has not presented sufficient evidence that there was any unofficial custom or practice of engaging in high-speed chases and improperly using excessive force. Plaintiff s expert referenced only two prior high-speed pursuits, and presented no specific evidence regarding the facts of these two incidents.[10] Vague references to two prior incidents do not constitute ratification and encouragement of an unconstitutional policy. See Bannum, Inc. v. City of Ft. Lauderdale, 901 F.2d 989, 998 n.29 (11th Cir. 1990)

(noting that an employee's unconstitutional decisions must have been made repeatedly to have become a "custom or usage" of which his or her supervisor must have known and approved.); see also Gilmere v. Atlanta, 737 F.2d 894, 904-05 (11th Cir. 1954)("occasional acts of untrained policemen standing alone are not attributable to city policy or custom). Additionally, the failure of the County to discipline the officers or conduct an investigation into this particular incident is insufficient evidence to establish a custom. Without evidence that the County persistently failed to discipline officers for such known unconstitutional conduct, such a policy cannot be inferred from the County's isolated decision not to discipline the officers involved in this incident. See McQurter y. City of Atlanta, 572 F. Supp. 1401, 1420 (N.D. Ga. 1953) (Forrester, J.) (internal citations omitted) (refusing to infer a policy of using excessive force based on evidence of a failure to discipline in one case only). For these reasons, Defendants' motion for summary judgment on this claim is GRANTED.

2. Failure to train

A municipality can be held liable under Section 1983 for inadequately training or supervising its employees only in limited circumstances. The inadequate training or supervising must evidence the municipality's "deliberate indifference" to the rights of the inhabitants so as to amount to a policy or custom that is actionable under Section 1983. See Gold v. City of Miami Fla., 151 F.3d 1346, 1350 (11th Cir. 1998) (quoting City of Canton v. Harris, 489 U.S. 378, 388-89-(1989)). Deliberate indifference is shown by "evidence that the municipality knew of a need to train and/or supervise in a particular

area and the municipality made a deliberate choice not to take any action." Id.

One of the ways a plaintiff may demonstrate a county's deliberate indifference is by showing that the need for a particular type of training is obvious, even without prior incidents to place the municipality on notice. Young v. City of Augusta, Ga., 59 F.3 d 1160, 1172 (11th Cir.1995). One example of such an obvious need is the use of deadly force where firearms are provided to police officers. See Gold, 151 F.3d at 1352. Here, Plaintiff argues, and the Court agrees, that there was an obvious need for training with respect to high-speed chases since the Coweta County officers were vested with the discretion to embark on high-speed chases and were allowed to ram vehicles under certain circumstances.[11] Indeed, the official pursuit policy authorized this conduct.

At his deposition, Sheriff Yeager testified that high-speed pursuits and PIT maneuvers are high risk activities that create an obvious need for training. Plaintiff's expert has also opined that pursuit driving and ramming techniques such as that used by Scott against Harris are high-risk activities which obviously require training. Thus, the Court concludes that Plaintiff has provided sufficient evidence to create a fact issue as to whether giving a police officer a vehicle and the discretion to use it in an offensive - and perhaps deadly manner creates a need to train that is so obvious' that, even without notice of prior constitutional violations, the County had a duty to train. See Gold, 151 F.3d at 1352; see also Brown v. Bryan County, 219 F.3d 450, (5th Cir. 2000) (finding that the need to train officers in how to make arrests

with force is so obvious that the failure to train in this area amounts to deliberate indifference to constitutional rights). Thus, a fact issue remains on the issue of whether the County's failure to train amounted to deliberate indifference.

As a final argument, Defendants respond that Plaintiff has failed to present competent evidence that the lack of training was the "moving force" behind, i.e., directly caused, the injuries suffered by Harris. The Court is not persuaded by this argument. A reasonable inference can be drawn from Plaintiff s evidence that a training course would have taught the officers to consider the underlying offense and whether other means - such as tracing the license plate number -- could be used to capture the suspect at a later time. Another reasonable inference is that, had the officers attended such a training course, they would have considered these factors, applied them in a reasonable manner, and decided against ramming Harris's car, and perhaps even against embarking on the chase in the first place.

Given these conclusions, the Court finds that Harris has carried his summary judgment burden of showing that the County's failure to train its officers constituted a policy decision for which the County can be held liable under Section 1983. Defendants' motion for summary judgment on this claim, therefore, is DENIED.

II. State Claims

A. Negligence and battery claims against Defendants Scott and Fenninger

Plaintiff alleges that Scott was negligent by (1)

attempting a PTT maneuver at high speeds on a two-lane road without any training; (2) operating his vehicle in an unsafe manner; and (3) ramming Plaintiff's vehicle. Plaintiff alleges that Fenninger was negligent in authorizing Scott's conduct without first obtaining the information necessary to evaluate the situation and make a proper decision. Defendants do not dispute that Plaintiff has made out a prima facie case of negligence, but rather respond that the officers are entitled to official immunity.

County employees are immune from liability unless they negligently perform ministerial tasks or act with actual malice in performing discretionary tasks. See Ga. Const. of 1983, Art. I, See. 11, Par. IX (d); Gilbert v. Richardson, 264 Ga. 744, 747 (1994). The decision to make an arrest is a discretionary act. See Anderson v. Cobb, 258 Ga. App. 159, 160 (2002). Plaintiff contends that his evidence supports a finding that Defendants Scott and Fenninger acted with actual malice because (1) both officers admit that the ramming of the car was deliberate and likely to cause harm and (2) Fenninger stated "take him out."

The evidence in this case demonstrates that Scott and Fenninger's intention was to stop Plaintiff's car - not to injure him. While Plaintiff may credibly argue that the officers violated his constitutional rights, his evidence simply does not support a conclusion that the officers intended to harm him. See Anderson, 258 Ga. App. at 160 (stating "[i]ll will alone is insufficient to establish actual malice; [the plaintiff] must show that [the defendant] acted with the deliberate intent to commit a wrongful act or with the deliberate intent to harm [him]."). In the absence of evidence of actual malice,

Scott and Fenninger are immune from the state law claims, and Defendants' motion for summary judgment on these claims is GRANTED.

B. Negligence claim against Coweta County

Despite the general rule that counties have sovereign immunity from tort claims, Plaintiff asserts that Coweta County nevertheless can be held liable for the state-law torts allegedly committed by Defendants Scott and Fenninger because Coweta County has waived its immunity pursuant to O.C.G.A. § 33-24-51. That Code section provides, in part, that: The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived as provided in Code Section 36-92-2. Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase the insurance authorized by subsection (a) of this Code section to provide liability coverage for the negligence of any duly authorized officer, agent, servant, attorney, or employee in the performance of his or her official duties in an amount greater than the amount of immunity waived as in Code Section 36-92-2, its governmental immunity shall be waived to the extent of the amount of insurance so purchased. Neither the municipal corporation, county, or political subdivision of this state nor the insuring company shall plead governmental immunity as a defense; and the municipal corporation, county, or political subdivision of this state or the insuring company may make only those defenses which could be made if the insured were a private person.

O.C.G.A. 33-24-51(b). Thus, by purchasing liability

insurance to cover the negligence of county employees arising from the use of a motor vehicle, a county waives sovereign immunity pursuant to O.C.G.A. § 33-24-51 (b), but only to the extent of the amount of insurance. See Woodard v. Laurens County, 265 Ga. 404, 406 (1995).[12]

Here, it is undisputed that Coweta County maintains insurance to cover it and its employees for any state tort liability arising from the use of county vehicles driven by its sheriff s deputies. It is also undisputed that the vehicle driven by Scott was owned by Coweta County and was covered by the County's insurance. It is clear to the Court that, pursuant to O.C.G.A. § 33-24-61(b), Coweta County has waived sovereign immunity with respect to Plaintiffs negligence claims against Defendants Scott and Fenninger.

Defendants next argue that even if there is a waiver of sovereign immunity, the general negligence standard does not apply and that Plaintiff must show that the officers acted with "reckless disregard" of public safety. In support of this argument, Defendants rely upon O.C.G.A. § 40-6-6 which, among other things, governs the operation of a law enforcement vehicle when pursuing a suspected law violator. This code section gives police officers authority to proceed past a red signal or stop sign after slowing down, exceed the maximum speed limits so long as life and property are not endangered, and disregard regulations governing direction. See O.C.G.A. § 40-6-6(b). "By these provisions, the legislature intended to grant police officers and drivers of emergency vehicles exceptional rights in operating motor vehicles, but also to protect travelers from an officer's or driver's reckless disregard

of the public's safety on the highways." Cameron v. Lang, 274 Ga. 122, 127-28 (2001). The code section also specifically addresses police pursuits:

When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit. Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.

O.C.G.A. § 40-6-6(c)(2) (emphasis supplied).

Plaintiff responds, and the Court agrees, that this statute is inapplicable to the present case. The statute specifically provides that "the law enforcement officer's pursuit" shall not be the proximate cause of an injury unless the officer acts with reckless disregard. Here, Plaintiffs negligence claim is not based on the officers' decision to initiate and pursue the chase; rather, it is based on the officers' decisions to ram Plaintiffs vehicle. Moreover, section § 40-6-6(b) provides law enforcement officers with specific "exceptional rights," and the right to ram another car is not listed as one of those rights.

As stated previously, Defendants do not dispute that

Plaintiff has made out a prima facie case of negligence. The Court concludes that Plaintiff has provided sufficient evidence to mare out a prima facie case of negligence against Scott for ramming Plaintiff's vehicle at high speeds on a two-lane-road without any training and against Fenninger for authorizing Scott's allegedly negligent use of his county vehicle without first obtaining the information necessary to evaluate the situation and make a proper decision. Accordingly, Defendants' motion for summary judgment on the negligence claim against Coweta County is DENIED.

CONCLUSION

Defendants' motion for summary judgment [36] is GRANTED IN PART and DENIED IN PART. After this ruling, the following claims remain pending: Fourth Amendment claim against Defendants Scott and Fenninger in their individual capacities; municipal liability claim for failure to train against Coweta County; and negligence claim against Coweta County based on the acts of Defendants Scott and Fenninger All other claims are hereby dismissed.

Defendants' motion to amend their answer [65] is GRANTED AS UNOPPOSED. It is so ORDERED this 25th day of September, 2003.

Willis B. Hunt, Jr.
Judge, United States District Court

Footnotes

fn1The speed of the chase is disputed. Defendants contend that it was in excess of 100 miles per hour.

Plaintiff denies that he drove that fast, but agrees that Scott, in his "overzealousness to join the pursuit" drove his cruiser at speeds well over 100 miles per hour.

fn2Defendants assert that Harris was boxed in by the officers and deliberately rammed Scott's cruiser in an attempt to get away. Harris maintains that the crash was unintentional.

fn3A PIT maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point which throws the car into a spin the driver cannot control, bringing the car to a stop.

fn4Defendants essentially concede that a seizure occurred. In their brief, they argue that officers Reynolds and Fenninger did not seize Plaintiff, but they do not include Scott in this argument. See Defs.' Br. [36] at 10-12.

fn5In support of this argument, Defendants rely exclusively upon dicta from Adams v. St. Lucie County Sheriffs Dept., 962 F.2d 1563 (11th Cir.1992); rev'd, 998 F.2d 923 (11th Cir. 1993 (per curiam). In Adams, the defendant officer intentionally rammed a fleeing misdemeanant several times following a high-speed pursuit through a residential neighborhood, and the final blow caused the car to go out of control. The car crashed, and the passenger was killed. The Eleventh Circuit struggled with this case, initially affirming the denial of summary judgment on qualified immunity grounds, see 962 F.2d at 1572, and then issuing a subsequent opinion reversing the denial of summary judgment for the reasons set forth in Judge

Edmonson's dissent in the original opinion, see 998 F.2d 923. Judge Edmonson reasoned that the officers were entitled to qualified immunity because in 1985, the law was not clearly established that ramming a vehicle constituted a seizure. See id. at 1576. He then goes on to opine that ramming a fleeing vehicle did not constitute a violation of the Fourth Amendment. See id. at 1577.

In the two-sentence second opinion, the Court did not adopt Judge Edmonson's dissent as its opinion, but rather reversed the district court based on the "reasoning" of the dissent. This Court concludes that the reasoning of the dissent focused on qualified immunity and whether the law with respect to seizures was clearly established. Thus, Judge Edmonson's discussion of whether ramming a vehicle constitutes a Fourth Amendment violation is dicta. Moreover, the Court's "reasoning" with respect to qualified immunity is called into question by the Supreme Court decision in Hoe v. Pelzer, 536 U.S. 730, 741 (2002), and the Eleventh Circuit's recent decision in Vaughan, 2003 U.S. App. LEXIS 18066.

fn6 Because the "objective reasonableness" standard applies regardless of whether the force applied was deadly or not, this Court need not decide whether Scott used deadly force.

fn7 Defendants do not specifically argue that Fenninger is entitled to qualified immunity, but the Court has considered this issue. For the same reasons that Scott is not entitled to qualified immunity as a matter of law, the Court concludes that Fenninger is not entitled to qualified immunity as a matter of law.

fn8Additionally, the Court concludes that the Fourteenth Amendment claim, based on Scott's alleged conscience-shocking conduct, lacks merit. There is no evidence that Scott had "a purpose to cause harm unrelated to the legitimate object of arrest." See Lewis, 523 U.S. at 836; see also County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (stating that the Fourteenth Amendment applies to high-speed pursuits only if there has been no seizure to implicate the Fourth Amendment).

fn9Harris has also sued Sheriff Yeager and the deputies in their official capacities. A claim against these defendants in their official capacities is the same as a claim against Coweta County. See Kentucky v. Graham, 473 U.S. 159 (1985). Because suits against county officials in their official capacities are the functional equivalent of a suit against the county, there is no need to bring official-capacity actions against local governmental officials. Defendants' motion for summary judgment on these claims, therefore, is GRANTED. See Busy v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991).

fn10 The Court, of course, is familiar with the facts of at least one of Deputy Cox's highspeed chases, which are recounted in the various opinions issued by the Eleventh Circuit. See Vaughan, 2003 U.S. App. LEXIS 18066. The Court, however, does not have sufficient facts before it to determine as a matter of law, that the County had a custom or practice of permitting such chases or permitting the inappropriate use of deadly force. Moreover, Plaintiff has presented no competent evidence concerning the County's alleged failure to

discipline Cox.

fn11 While the Court has discounted Plaintiff's vague evidence regarding prior Incidents, the facts of Vaughan demonstrate that, at the time of the incident involving Harris, Coweta County certainly knew that its officers had the means as well as the discretion to embark on dangerous high-speed chases and to use force during those chases.

fn12 Plaintiff asserts that sovereign immunity is waived not only for the negligent acts of county employees, but also for the intentional torts of those employees, but he has provided no authority for this position. Accordingly, Defendants' motion for summary Judgment on all state law claims other than negligence against the County is GRANTED.

Filed 2/17/06
No. 03-15094

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VICTOR HARRIS,
Plaintiff-Appellee,

Versus

COWETA COUNTY, GEORGIA, et al.,
Defendants,

MARK FENNINGER, Sgt., TIMOTHY C. SCOTT,
Deputy, Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 01-00148-CV-WBH-3.

JUDGES: Before BIRCH, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Supreme Court, U.S.
FILED
DEC 13 2006
OFFICE OF THE CLERK

No. 05-1631

In The Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

CRAIG T. JONES
Counsel of Record
EDMOND & JONES, LLP
127 Peachtree Street, N.W.
Suite 410
Atlanta, Georgia 30303
(404) 525-1080
(404) 525-1073 Fax

ANDREW C. CLARKE
BOROD & KRAMER
80 Monroe Avenue, Suite G-1
Memphis, Tennessee 38103
(901) 524-0200

Counsel for Respondent

PHILIP W. SAVRIN
Counsel of Record
SUN S. CHOY
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000
(770) 937-9960 Fax

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775

Counsel for Petitioner

Petition For Certiorari Filed On May 18, 2006
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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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United States District Court for the Northern District of Georgia Case Number 3:01-cv-00148-WBH

* * *

10/21/2002 Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment Filed by Attorney for Defendant/Petitioner

* * *

11/14/2002 Plaintiff's Statement of Material Facts Pursuant to N.D. Local Rule 56 Filed by Attorney for Plaintiff/Respondent

* * *

09/25/2003 Unpublished order denying in part and granting in part defendants' motion for summary judgment

United States Court of Appeals
for the Eleventh Circuit
No. 03-15094-HH

* * *

12/23/2005 Rehearing Opinion – reversed in part; affirmed in part

* * *

02/17/2006 Order denying petition for rehearing and petition for rehearing en banc

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

VICTOR HARRIS, Plaintiff, v. COWETA COUNTY, GEORGIA; SHERIFF MICHAEL S. YEAGER; SGT. MARK FENNINGER; DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY C. "CHUCK" SCOTT, Defendants.	CIVIL ACTION FILE NO.3:O1-CV-148-WBH

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 21, 2002)

COME NOW defendants and, pursuant to Local Rule 56.1(B)(1), file this Statement of Undisputed Facts in Support of their Motion for Summary Judgment.

1.

At approximately 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's Office was stationed on Highway 34 when he detected a vehicle traveling 73 miles per hour in a 55 mile per hour zone. (Depo. of Reynolds, pp. 72-73 and 75). Reynolds flashed his blue lights, but the vehicle would not slow down; instead, it picked up speed. (Depo. of Reynolds, pp.

73 and 76). At that point, Reynolds decided to initiate a pursuit to investigate the vehicle's refusal to slow down. (Depo. of Reynolds, p. 76).

2.

Under the vehicle pursuit policy of Coweta County Sheriff's Office that was in effect, decisions regarding the initiation, continuation and termination of pursuits were left to the discretion of the officer and supervisor in the field. (Depo. of Alpert, p. 54; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriff's Office Policies and Procedures Manual, pp. 92-94). Plaintiff's expert agrees that this "judgmental policy" is the majority policy for law enforcement agencies in the country. (Depo. of Alpert, p. 54). Plaintiff's expert further agrees that the deputies involved in the pursuit had the legal authority to stop the suspect. (Depo. of Alpert, pp. 72-73).

3.

In any event, after flashing lights failed to stop the vehicle, Reynolds caught up to the vehicle just past Sullivan Road and turned on his lights and siren, which activated his video camera. (Depo. of Reynolds, pp. 77-79; Video recording of the pursuit filed contemporaneously with Defendants' Memorandum in support of Motion for Summary Judgment as Exhibit A,[1] 78-22:42:00). Unbeknownst to Reynolds at the time, the vehicle was driven by Victor Harris, who had been arrested earlier that day,

[1] References to the video recording from the vehicles of Reynolds and Scott are denoted by vehicle number – No. 78 for Reynolds and No. 66 for Scott – and time as reflected on the video counter.

knew he was being pursued and was determined nevertheless not to be captured. (Depo. of Harris, pp. 84-85, 103 and 111). As Harris himself explained during this deposition, he was determined not to stop because he thought he could get away and, in any event, did not want to incur an impound fee for his car if it had to be towed from the scene of his arrest. (Depo. of Harris, pp. 104-06 and 111).

4.

Harris first headed eastbound toward Peachtree City at speeds in excess of 100 miles per hour, and passing vehicles on double yellow traffic control lines. (Exhibit A, 78-22:42:48; 78-22:44:09; Depo. of Reynolds, p. 50, Exhibit 6, "Incident Report"). He even ran through a red light at the intersection of Highway 34 and Fisher Road by passing several vehicles in the turning lane that were stopped at the light. (Exhibit A, 78-22:44:36; Depo. of Reynolds, p. 50, Exhibit 6, "Incident Report").

5.

Meanwhile, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle. (Depo. of Reynolds, p. 81; Depo. of Scott, p. 115). Deputy Chuck Scott heard Reynolds' radio communication and joined the pursuit to provide backup for his partner, as the pursuit proceeded toward the county line and into Fayette County. (Exhibit A, 66-22:43:01; Depo. of Reynolds, p. 82; Depo. of Scott, p. 118).

6.

Pursuant to their training, once Scott joined the pursuit, he began to call out the location of the pursuit on the radio to allow Reynolds, as the lead vehicle, to concentrate on his driving and the pursuit of Harris. (Exhibit A, 78-22:44:53; Depo. of Reynolds, p. 82). Reynolds, Scott and their supervisor Sgt. Mark Fenninger, along with all the other deputies in the Sheriff's Office, were operating pursuant to the training they had each received in compliance with Georgia law as set by the requirements of the Georgia Peace Officer Standards and Training Council (P.O.S.T.). (Depo. of Sheriff Yeager, pp. 67-68; Depo. of Alpert, p. 142; Depo. of Scott, Exhibit 2, P.O.S.T. records; Depo. of Reynolds, Exhibit 1, P.O.S.T. records; Depo. of Fenninger, Exhibit 1, P.O.S.T. records). Sheriff Michael Yeager also required his deputies to have an additional twenty (20) hours of training per year *beyond* the state requirements. (Depo. of Sheriff Yeager, p. 78).

7.

As the pursuit headed towards Peachtree City, Harris continued to pass vehicles on double yellow traffic control lines at a high rate of speed. (Exhibit A, 78-22:45:26; 78-22:45:28; 78-22:45:32; 78-22:45:37; and 78-22:45:43). After the pursuit crossed into Peachtree City, Harris turned into a drugstore parking lot located in a shopping complex. (Exhibit A, 78-22:46:02; Depo. of Reynolds, p. 87). At this point, two Peachtree City police vehicles were in the parking lot and one of the officers (Sgt. Mark Brown) joined in. (Depo. of Reynolds, p. 87; Depo. of Brown, pp. 8 and 14). Reynolds followed Harris as he weaved through the shopping complex towards Highway 74, while Scott proceeded around the opposite side of the complex to block

Harris' exit onto Highway 74. (Exhibit A, 66-22:46:39; 66-22:46:39; Depo. of Reynolds, pp. 87-88 and 91-92; Depo. of Scott, pp. 171-73).

8.

Scott attempted to block the exit as he entered the shopping complex from Highway 74. (Exhibit A, 66-22:46:57; Depo. of Scott, p. 175). Although Harris was "boxed-in" by three law enforcement vehicles (Depo. of Harris, p. 103), he crashed into Scott's vehicle and thereby escaped back onto Highway 74. (Exhibit A, 78-22:46:20; 78-22:46:23; and 66-22:46:57).

9.

As the pursuit entered Highway 74, Sgt. Brown ordered his fellow Peachtree City officers to block intersections from cross-traffic. (Depo. of Brown, p. 13). Officer Jason Ercole of the Peachtree City police also joined in the pursuit, but followed from a distance. (Exhibit A, 78-22:46:30; Depo. of Brown, pp. 14-15; Depo. of Ercole, pp. 8-10 and 22-23).

10.

Despite being pursued by four law enforcement officers from two separate jurisdictions, Harris proceeded south on Highway 74, once again at speeds approximating 90 to 100 miles per hour. (Depo. of Reynolds, p. 112 and Exhibit 6, "Incident Report"). He continued to pass vehicles while crossing the double yellow traffic control lines, and raced through more intersections, including a red light. (Exhibit A, 66-22:47:49; 78-22:46:56; 66-22:47:55; 66-22:48:28).

11.

Given Harris' reckless actions and the clear danger posed to the public, the deputies determined that the pursuit needed to be brought to an end as soon as practicable. (Depo. of Reynolds, p. 114; Depo. of Scott, pp. 186-187; Depo. of Fenninger, pp. 54-56 and Exhibit 4, "Supplement Report," and Exhibit 5, "Incident Report"). Scott therefore requested and obtained approval from his supervisor, Sgt. Mark Fenninger – as required by his training and the pursuit policy – to make physical contact with the vehicle in what is termed a "PIT" maneuver. (Exhibit A, 79-22:47:35; Depo. of Scott, pp. 143-44; Depo. of Fenninger, p. 53; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriff's Office Policies and Procedures Manual, p. 93).

12.

Prior to the authorization, Fenninger was advised that Reynolds and Scott had pursued Harris into the parking lot of a shopping complex, and that Harris had hit Scott's vehicle to effectuate his escape. (Depo. of Fenninger, pp. 38, 46 and 54-55). When Harris entered the commercial area of the shopping complex, Fenninger's concern was for the safety of pedestrians. (Depo. of Fenninger, pp.38-39). Once he was advised that Harris had struck Scott's vehicle, he authorized the PIT maneuver to get Harris stopped. (Depo. of Fenninger, pp. 54-55). Fenninger maintained radio contact with the deputies while on his way to the pursuit location. (Depo. of Fenninger, pp. 35 and 46).

13.

Since Scott's vehicle was already damaged from the impact at the shopping complex, Scott assumed the lead

position and approached the vehicle to perform the PIT maneuver. (Exhibit A, 66-22:47:21; 66-22:48:39). Due to the high rate of speed, Scott was unable to perform the PIT maneuver. Instead, he slowed his vehicle and tapped the rear bumper of Harris' vehicle. (Depo. of Scott, pp. 146-47). Scott decided to make direct contact with his push bumper, while no other motorist were in the area. (Depo. of Scott, p. 147). Harris' vehicle then left the roadway and crashed. (Exhibit A, 66-22:48:47).

14.

The entire pursuit covered approximately nine miles, and lasted approximately six (6) minutes. (Exhibit A; Depo. of Reynolds, p. 78). Although Harris has been rendered a quadriplegic, (Depo. of Harris, pp. 166-68), he fortunately survived, and no officer or third-parties were injured along the way as a result of his recklessness.

FREEMAN MATHIS & GARY, LLP

/s/ Sun S. Choy
Philip W. Savrin
Georgia Bar No. 627836
Sun S. Choy
Georgia Bar No. 025148
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948
(770) 818-0000 (telephone)
(770) 937-9960 (facsimile)

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

VICTOR HARRIS,	
Plaintiff,	
v.	
COWETA COUNTY, GEORGIA; SHERIFF MICHAEL S. YEAGER; SGT. MARK FENNINGER; DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY C. "CHUCK" SCOTT,	**CIVIL ACTION FILE NO. 3:01-CV-148-WBH**
Defendants.	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO N.D. LOCAL RULE 56

COMES NOW the Plaintiff, by and through his attorneys of record, and hereby responds to the Defendants' Statement of Material Facts (Part I) and hereby files Plaintiff's Statement of Material Facts As to Which There is a Genuine Issue to be Tried (Part II), showing the Court as follows:

I. PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

OBJECTION: Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment fails to comply with Local Rule 56.1(B)(1) by failing to set forth separately enumerated facts which the Defendants contend are undisputed. Instead, the Defendants set forth

14 paragraphs of "facts" which contain numerous sentences. In order to fully and accurately respond to these paragraphs, the Plaintiff finds it necessary to respond to each sentence one at a time. Although Defendants' noncompliance with the Local Rules makes the Plaintiffs response to the Defendants' statement more difficult, Plaintiff has responded to the best of his ability. The following is the Plaintiffs response to the enumerated paragraphs of Defendants' statement of allegedly undisputed facts:

1.

At approximately 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's Office was stationed on Highway 34 when he detected a vehicle traveling 73 miles per hour in a 55 mile per hour zone. (Depo. of Reynolds, pp. 72-73 and 75). Reynolds flashed his blue lights, but the vehicle would not slow down; instead, it picked up speed. (Depo. of Reynolds depo., pp. 73 and 76). At that point, Reynolds decided to initiate a pursuit to investigate the vehicle's refusal to slow down. (Depo. of Reynolds, p. 76).

RESPONSE: The Plaintiff admits that Defendant Reynolds has testified that he was stationed on Highway 34 when he alleges he clocked the Plaintiff's vehicle traveling at 73 m.p.h. in a 55 m.p.h. zone. (Reynolds depo. at 72-73, 75). The Plaintiff further admits that Reynolds flashed his blue lights to attempt to get the Plaintiff's vehicle to slow down. (*Id.* at 73, 75). Plaintiff admits that Reynolds testified that the Plaintiff's vehicle did not slow down in response to the blue lights. (*Id.* at 77). However, the Plaintiff denies that he increased his speed after

seeing the blue lights. Pursuant to Reynolds' testimony, Reynolds testifies: 1) that he clocked the Plaintiffs vehicle using his rear antennae (*Id.* at 73); 2) when the Plaintiff's vehicle passed, he switched his radar to the front antennae and the Plaintiffs vehicle "was still doing seventy three miles per hour" (*Id.* at 73); 3) Reynolds' radar was set in the stationary mode which would not register a speed reading once Reynolds' police vehicle started moving (*Id.* at 73-74); and 4) Reynolds never switched his radar from stationary to moving which would have provided the numerical value of any increase of speed in the Plaintiff's vehicle. (*Id.* at 74).

The Plaintiff further admits that Defendant Reynolds made a decision to pursue the Plaintiffs vehicle solely on the basis of a traffic violation – speeding 73 m.p.h. in a 55 m.p.h. zone. (*Id.* at 76).

2.

Under the vehicle pursuit policy of Coweta County Sheriffs Office that was in effect, decisions regarding the initiation, continuation and termination of pursuits were left to the discretion of the officer and supervisor in the field. (Depo. of Alpert, p. 54; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriffs Office Policies and Procedures Manual, pp. 92-94). Plaintiffs expert agrees that this "judgmental policy" is the majority policy for law enforcement agencies in the country. (Depo. of Alpert, p. 54). Plaintiffs expert further agrees that the deputies involved in the pursuit had the legal authority to stop the suspect. (Depo. of Alpert, pp. 72-73).

RESPONSE: The Plaintiff admits that under the CCSD Pursuit Policy, decisions to initiate, continue or

terminate a pursuit were vested solely to the discretion of pursuing officer within the guidelines set forth in the Pursuit Policy. (Scott depo. at Ex. 11). Specifically, the CCSD Pursuit Policy states that: 1) "the pursuing deputy should keep in mind his personal safety and try everything within his authority to apprehend the violator without resorting to a high speed chase" (*Id.* at 93); 2) a "pursuit will be discontinued: (a) upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public; (e) upon receipt of additional information once the pursuit begun [sic] that would allow later apprehension and successful prosecution." (*Id.* at 93-94).

In the case *sub judice*, the vehicle that the Plaintiff was driving was registered in his name and at his proper address. (Accident report attached hereto as Exhibit "A"; Harris depo. at 10). Based on the CCSD Pursuit Policy, the Plaintiff submits that Reynolds violated his policy by failing to discontinue the pursuit because the offense was speeding and Reynolds had the tag number of the vehicle which would have made apprehension and prosecution at a later date probable. (Alpert Aff., Alpert Expert Rep. at 11-12; Reynolds depo. at 81-83).

The Plaintiff further admits that under the CCSD Pursuit Policy, a supervisor had the authority and duty to terminate a pursuit when the need for immediate apprehension of the suspect to the public outweighed the dangers of the pursuit. (Scott depo. at Ex. 11). The Plaintiff further submits that Fenninger was Scott [sic] supervisor who was supposed to be supervising the pursuit. (Fenninger depo. at 37). Further, the purpose of supervising an officer during the course of a pursuit is to ensure that the

pursuing officer, who is filled with adrenalin, does not make bad decisions. (Fenninger depo. at 48-50).

The Plaintiff admits that Plaintiff's expert had testified that the majority of departments in the country had judgmental policies. (Alpert depo. at 54). However, Plaintiffs expert further testified that any department which maintains a judgmental policy had an affirmative duty to provide it officers with significant training on the decision-making aspects of pursuits, because a policy which gives wide latitude to officers requires a higher level of training to make sure that officers make the proper decisions. (Alpert Aff., Expert Rep. at 9-10, 12; Alpert depo. at 54-55) By comparison, the Peachtree City Police Department had a restrictive policy, not a judgmental policy, which would have prohibited the pursuit of the Plaintiff. (Brown depo. at 42-43; Ercole depo. at 15, 17-18; Murray depo. at Ex. 6). Chief Murray of the Peachtree City Police Department wrote a letter to the Governor of the State of Georgia requesting that all pursuit policies be restricted by the state if police departments fail to voluntarily restrict or enforce their pursuit policies. (Murray depo. at Ex. 7). The CCSD changed its policy to a restrictive one after this incident and had been working on updating its policies since 1997-1998. (Yeager depo. at 13-15).

The CCSD failed to provide its officers with any training on high-speed pursuits. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Further, the CCSD failed to even ensure that its officers, including Reynolds, Scott and Fenninger, read and understood the CCSD Pursuit Policy. (Yeager depo. at 77).

The Plaintiff admits that the Defendants had the legal authority to initiate a traffic stop of the Plaintiff for speeding.

3.

In any event, after flashing lights failed to stop the vehicle, Reynolds caught up to the vehicle just past Sullivan Road and turned on his lights and siren, which activated his video camera. (Depo. of Reynolds, pp. 77-79; Video recording of the pursuit filed contemporaneously with Defendants' Memorandum in support of Motion for Summary Judgment as Exhibit A[1], 78-22:42:00). Unbeknownst to Reynolds at the time, the vehicle was driven by Victor Harris, who had been arrested earlier that day, knew he was being pursued and was determined nevertheless not to be captured. (Depo of Harris, pp. 84-85, 103 and 111). As Harris himself explained during this deposition, he was determined not to stop because he thought he could get away and, in any event, did not want to incur an impound fee for his car if it had to be towed from the scene of his arrest. (Depo. of Harris, pp. 104-06 and 111).

RESPONSE: The Plaintiff admits that Defendant Reynolds initiated a pursuit of the Plaintiff and his dash-mounted video camera activated at some point thereafter. (Reynolds depo. at 77-70; Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

The Plaintiff denies that Reynolds did not know the identity of the driver of the Plaintiff's vehicle. In fact, the

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[1] References to the video recording from the vehicles of Reynolds and Scott are denoted by vehicle number – No. 78 for Reynolds and No. 66 for Scott – and time as reflected on the video counter.

Plaintiff submits that immediately after engaging in the pursuit of the Plaintiff, Reynolds called in the tag number of the vehicle being driven the Plaintiff which was registered in the Plaintiff's name at the Plaintiff's proper address. (Reynolds depo. at 81-83).

The Plaintiff admits that Reynolds did not know that the Plaintiff had been arrested earlier that day and, therefore, this fact is neither relevant or material. The Plaintiff denies that he was determined not to be captured, but was running because he was scared and attempting to drive home to avoid having his car impounded or towed. (Harris depo. at 104-05, 107-08).

4.

Harris first headed eastbound toward Peachtree City at speeds in excess of 100 miles per hour, and passing vehicles on double yellow traffic control lines. (Exhibit A, 78-22:42:48; 78-22:44:09; Depo. of Reynolds, p.50, Exhibit 6, "Incident Report"). He even ran through a red light at the intersection of Highway 34 and Fisher Road by passing several vehicles in the turning lane that were stopped at the light. (Exhibit A, 78-22:44:36; Depo. of Reynolds, p. 50, Exhibit 6, "Incident Report").

RESPONSE: The Plaintiff admits that he drove his vehicle towards Peachtree City which is also towards the Plaintiff's home. The Plaintiff admits that during the course of the pursuit, he passed vehicles on a double yellow line in violation of the traffic statutes. However, the Plaintiff would state that at least eight times during the pursuit, he utilized his blinkers while passing or making turning movements. Further, the Plaintiff would state that at no time during the course of the pursuit did he

intentionally use his vehicle as a weapon or strike another motorist. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff admits that he ran a red light at the intersection of Highway 34 and Fisher Road. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). Further, the Plaintiff submits that he slowed for the intersection of 74 and Kelly or Crosstown Drive. (Ercole depo. at 25-26). Plaintiff admits that he was speeding but denies that he drove in excess of 100 miles per hour. (Videotapes attached as Exhibit "A" to Defendant's Motion for Summary Judgment and Exhibit "D" hereto)

5.

Meanwhile, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle. (Depo. of Reynolds, p. 81; Depo. of Scott, p.115). Deputy Chuck Scott heard Reynolds' radio communication and joined the pursuit to provide backup for his partner, as the pursuit proceeded toward the county line and into Fayette County. (Exhibit A, 66-22:43:01; Depo of Reynolds, p. 82; Depo. of Scott, p.118).

RESPONSE: The Plaintiff submits that Reynolds radioed his dispatcher and reported he was involved in a pursuit at the beginning of the pursuit. (Reynolds depo. at 81-83). Further, the Plaintiff submits that Reynolds broadcast the license plate number of the Plaintiff's vehicle over the radio which would make apprehension at a later time possible without the necessity of a high-speed pursuit. *Id.* Further, Plaintiff submits that the Reynolds never broadcast over the radio the underlying charge which precipitated the pursuit (which was speeding) and neither

Scott nor Fenninger knew the underlying basis for the pursuit. (Scott depo. at 116-117, 159-160; Fenninger depo. at 34-37). Further, Reynolds never informed the Peachtree City Police Department that they were pursuing a suspect into their jurisdiction (out of Reynolds' jurisdiction) or the underlying basis for the pursuit. (Brown depo. at 11-12). The Plaintiff admits that Scott unilaterally decided to assist Reynolds in his pursuit of the Plaintiff. (Reynolds depo. at 82; Scott depo. at 118). For further response, the Plaintiff would state that Scott was not requested to join the pursuit and made the decision to join the pursuit without determining the underlying reason for the pursuit. (Scott depo. at 116-118, 159-160; Reynolds depo. at 82). The Plaintiff further submits that in Scott's overzealousness to join the pursuit, it appears that he drove his patrol car at speeds well over 100 m.p.h. (Videotapes attached as Exhibit "A" to the Defendants' Motion for Summary Judgment)

6.

Pursuant to their training, once Scott joined the pursuit, he began to call out the location of the pursuit on the radio to allow Reynolds, as the lead vehicle, to concentrate on his driving and the pursuit of Harris. (Exhibit A, 78-22:44:53; Depo of Reynolds, p.82). Reynolds, Scott and their supervisor Sgt. Mark Fenninger, along with all the other deputies in the Sheriffs Office, were operating pursuant to the training they had each received in compliance with Georgia law as set by the requirements of the Georgia Peace Officer Standards and Training Council (P.O.S.T.). (Depo of Sheriff Yeager, pp. 67-68; Depo. of Alpert, p.142; Depo. of Scott, Exhibit 2, P.O.S.T. records; Depo. of Reynolds, Exhibit 1, P.O.S.T records; Depo of

Fenninger, Exhibit 1, P.O.S.T. records). Sheriff Michael Yeager also required his deputies to have an additional twenty (20) hours of training per year *beyond* the state requirements. (Depo. of Sheriff Yeager, p. 78).

RESPONSE: The Plaintiff denies that Scott, Reynolds or Fenninger had any high-speed pursuit training. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Further, the CCSD failed to even ensure that its officers, including Reynolds, Scott and Fenninger, read and understood the CCSD Pursuit Policy. (Yeager depo. at 77). As the Defendants failed to have any high-speed pursuit training, the Plaintiff denies that any actions taking by the officers was pursuant to their training.

The Plaintiff admits that Scott took over the radio communications once he caught up to the pursuit. (Videotapes attached as Exhibit "A" to the Defendants' Motion for Summary Judgment).

The Plaintiff admits that Sheriff Yeager required his officers to have an additional 20 hours of training beyond the state requirements. However, the Plaintiff denies that Sheriff Yeager provided his officers, including Scott and Reynolds, **any training whatsoever** on high-speed pursuits or deadly force applications during the course of high-speed pursuits. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Significantly, Sheriff Yeager provided no training to his officers on high-speed pursuits and deadly force applications despite admitting that there was an obvious need to

train officers on high-speed pursuits and deadly force applications. (Yeager depo. at 32-34).

7.

As the pursuit headed towards Peachtree City, Harris continued to pass vehicles on double yellow traffic control lines at a high rate of speed. (Exhibit A, 78-22:45:26; 78-22:45:28; 78-22:45:32; 78-22:45:37; and 78:22:45:43). After the pursuit crossed into Peachtree City, Harris turned into a drugstore parking lot located in a shopping complex. (Exhibit A, 78-22:46:02; Depo. of Reynolds, p. 87). At this point, two Peachtree City police vehicles were in the parking lot and one of the officers (Sgt. Mark Brown) joined in. (Depo. of Reynolds, p. 87; Depo. of Brown, pp. 8 and 14). Reynolds followed Harris as he weaved through the shopping complex towards Highway 74, while Scott proceeded around the opposite side of the complex to block Harris' exit onto Highway 74. (Exhibit A, 66-22:46:39; 66-22:46:39; Depo. of Reynolds, pp. 87-88 and 91-92; Depo. of Scott, pp. 171-73).

RESPONSE: The Plaintiff admits that during the course of the pursuit, he passed vehicles on a double yellow line in violation of the traffic statutes. However, the Plaintiff would state that at least eight times during the pursuit, he utilized his blinkers while passing or making turning movements. Further, the Plaintiff would state that at no time during the course of the pursuit did he intentionally use his vehicle as a weapon or strike another motorist. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). Further, the Plaintiff submits that he slowed for the intersection of 74 and Kelly or Crosstown Drive. (Ercole depo. at 25-26).

The Plaintiff submits that once he entered into Peachtree City, the Plaintiff slowed his vehicle, turned on his blinker and entered into a drug store parking lot. (Videotapes attached as Ex. "A" to Defendants' Motion for Summary Judgment).

The Plaintiff admits that when he turned into the parking lot, there were two Peachtree City officers in the parking lot. (Mark Brown depo. at 7). However, the Plaintiff denies that Sgt. Mark Brown of the PCPD joined in the pursuit. (*Id.* at 14-16). Sgt. Brown did not know the reason for the pursuit and, therefore, did not join the pursuit. *Id.* Instead, Sgt. Brown followed the pursuit route to broadcast information about the pursuit to his fellow officers to assist in stopping traffic at intersections on the pursuit route. (*Id.* at 14-16, 19-20). Further, Sgt. Brown testified that a pursuit for a speeding violation would be in violation of the Peachtree City Police Department Pursuit Policy which only allows pursuits for violent felonies. (*Id.* at 42-43; Murray depo. at Ex. 6).

The Plaintiff admits that Reynolds followed the Plaintiff into the parking lot. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff denies that he "weaved" through the parking lot. The Plaintiff admits that he drove on a private roadway through the parking lot and around a traffic circle or turnabout. *Id.* The Plaintiff further submits that Defendant Scott was traveling too fast to make the turn into the parking lot. (Reynolds depo. at Ex. 6). After missing the entrance to the parking lot, Defendant Scott drove his vehicle around the parking lot and attempted to block the Plaintiff from exiting onto Highway 74 by driving his vehicle directly into the path of the Plaintiff's vehicle. (Videotapes attached as Exhibit "A" to Defendants'

Motion for Summary Judgment; Reynolds depo. at 91, 97 and Ex. 6; Scott depo. at 175 and Ex. 1).

8.

Scott attempted to block the exit as he entered the shopping complex from Highway 74. (Exhibit A, 66-22:46:57; Depo. of Scott, p.175). Although Harris was "boxed-in" by three law enforcement vehicles (Depo. of Harris, p. 103), he crashed into Scott's vehicle and thereby escaped back onto Highway 74. (Exhibit A, 78-22:46:20; 78-22:46:23; and 66-22:46:57).

RESPONSE: The Plaintiff admits that Scott attempted to block the exit to the parking lot by driving his patrol car directly into the Plaintiff's lane of traffic. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 91, 97 and Ex. 6; Scott depo. at 175 and Ex. 1).

The Plaintiff denies that he was boxed in by three law enforcement vehicles as Sgt. Brown did not participate in any attempt to stop the Plaintiff. (Brown depo. at 14-16, 19-20). The Plaintiff admits that Scott attempted to block the exit by driving his vehicle directly into the Plaintiff's lane of traffic, with Reynolds in pursuit of the Plaintiff from behind. (Videotapes attached as an Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 91, 97, and Ex. 6; Scott depo. at 175 and Ex. 1).

The Plaintiff admits that contact was made between the Plaintiff's vehicle and Scott police vehicle. The Plaintiff denies that "he crashed" into Scott's vehicle. The Plaintiff would state that the videotape clearly indicates

that: 1) Scott drove his vehicle directly into the Plaintiff's lane of traffic; 2) Plaintiff attempted to turn his vehicle to the left to avoid contact with Scott's vehicle; 3) Scott turned his police vehicle to the right in an effort to "box in" and/or stop the Plaintiff; and 4) minor contact occurred between the Plaintiff's vehicle and Scott's police vehicle. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 91, 97 and Ex. 6; Scott depo. at 175 and Ex. 1).

9.

As the pursuit entered Highway 74, Sgt. Brown ordered his fellow Peachtree City officers to block intersections from cross-traffic (Depo. of Brown, p. 13). Officer Jason Ercole of the Peachtree City police also joined in the pursuit, but followed from a distance. (Exhibit A, 78-22:46:30; Depo. of Brown, pp. 14-15; Depo. of Ercole, pp. 8-10 and 22-23).

RESPONSE: The Plaintiff admits that Sgt. Brown ordered his fellow Peachtree City officers to block intersections on the pursuit route. (Brown depo. at 13, 14-16, 19-20).

The Plaintiff denies that Officer Ercole joined the pursuit as a pursuing officer. (Murray depo. at 13; Brown depo. at 14; Ercole depo. at 8-10, 22-23). The Plaintiff admits that Sgt. Brown and Officer Ercole of the PCPD followed the pursuit at a distance in an effort to clear the intersections on the pursuit path. (Brown depo. at 13-16).

10.

Despite being pursued by four law enforcement officers from two separate jurisdictions, Harris proceeded south on Highway 74, once again at speeds approximating 90 to 100 miles per hour. (Depo. of Reynolds, p. 112 and Exhibit 6, "Incident Report"). He continued to pass vehicles while crossing the double yellow traffic control lines, and raced through more intersections, including a red light. (Exhibit A, 66-22:47:49; 78-22:46:56; 66-22:47:55; 66-22:48:28).

RESPONSE: The Plaintiff denies that he was being pursued by four officers from two separate jurisdictions. The Plaintiff admits that during the course of the pursuit, he passed vehicles on a double yellow line in violation of the traffic statutes. However, the Plaintiff would state that at least eight times during the pursuit, he utilized his blinkers while passing or making turning movements. Further, the Plaintiff would state that at no time during the course of the pursuit did he intentionally use his vehicle as a weapon or strike another motorist. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). Further, the Plaintiff submits that he slowed for the intersection of 74 and Kelly or Crosstown Drive. (Ercole depo. at 25-26).

11.

Given Harris' reckless actions and the clear danger posed to the public, the deputies determined that the pursuit needed to be brought to an end as soon as practicable. (Depo. of Reynolds, p. 114; Depo. of Scott, pp. 186-187; Depo. Of Fenninger, pp.54-56 and Exhibit 4, "Supplement Report"). Scott therefore requested and obtained

approval from his supervisor, Sgt. Mark Fenninger – as required by his training and the pursuit policy – to make physical contact with the vehicle in what is termed a "PIT" maneuver. (Exhibit A, 79-22:47:35; Depo. of Scott, pp. 143-44; Depo. of Fenninger, p. 53; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriffs Office Policies and Procedures Manual, p.93).

RESPONSE: While the Plaintiff admits that he was violating traffic laws, the Plaintiff denies that he was driving in such a reckless manner as to be a clear and present danger to the public and was in control of his vehicle until it was rammed off the road by Defendant Scott. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

The Plaintiff denies that Scott, Reynolds or Fenninger had any high-speed pursuit training. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Further, the CCSD failed to even ensure that its officers, including Reynolds, Scott and Fenninger, read and understood the CCSD Pursuit Policy. (Yeager depo. at 77). As the Defendants failed to have any high-speed pursuit training, the Plaintiff denies that any actions taking [sic] by the officers was pursuant to their training.

The Plaintiff admits that Scott requested permission from his supervisor, Fenninger, to use a PIT maneuver on the Plaintiff. (Scott depo. at 142-144; Fenninger depo. at 54-55). The Plaintiff further submits that neither Scott nor Fenninger were trained in the use of PIT maneuver. (Scott depo. at 137-139). Further, the Plaintiff submits that Fenninger was required as a supervisor to find out information about the pursuit concerning the charges, speeds,

traffic conditions, etc. and that he failed to properly determine the charges and traffic conditions prior to receiving the request to use the PIT maneuver by Scott. (Fenninger depo at 34-27).

Despite not performing his supervisory duties by determining the nature of the underlying offense and the presence of pedestrian or vehicular traffic, Fenninger responded to Scott request for permission to PIT by stating over the radio, "Go ahead and take him out. Take him out." (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Fenninger depo. at 54-55).

The Plaintiff submits that under the circumstances then and there existing, Scott requested permission to use deadly force as death or serious bodily injury could result from intentionally ramming the Plaintiff's vehicle. (Yeager depo. at 58, 96; Kinsey depo. at 44; Fenninger depo. at 62-63; Scott depo. at 153, 157; Reynolds depo. at 117-120; Ercole depo. at 37-40). Further, Fenninger expressly testified that when he authorized Scott to "take out" the Plaintiff, he was authorizing the use of deadly force. (Fenninger depo. at 62-63). Further, at the time of the ramming (application of deadly), there were no motorists in the area who were in fear of their life or personal safety. (See Defendants' Statement of Undisputed Facts at No. 13; Scott depo. at 147 and Ex. 1; Reynolds depo. at 121-123; Ercole depo. at 28, 47; Fenninger depo. at 60).

12.

Prior to the authorization, Fenninger was advised that Reynolds and Scott had pursued Harris into the parking lot of a shopping complex, and that Harris had hit

Scott's vehicle to effectuate his escape. (Depo. of Fenninger, pp. 38, 46 and 54-55). When Harris entered the commercial area of the shopping complex, Fenninger's concern was for the safety of pedestrians. (Depo. of Fenninger, pp.38-39). Once he was advised that Harris had struck Scott's vehicle, he authorized the PIT maneuver to get Harris stopped. (Depo. of Fenninger, pp. 54-55). Fenninger maintained radio contact with the deputies while on his way to the pursuit location. (Depo. of Fenninger, pp. 35 and 46).

RESPONSE: The Plaintiff denies that Fenninger was specifically advised that Reynolds and Scott had pursued the Plaintiff into a shopping center and that the Plaintiff had hit Scott's vehicle to effectuate an escape. The Plaintiff submits that Reynolds and Scott had broadcast over the radio that they were in pursuit of the Plaintiff and had entered a shopping complex and that there was a "10-50" (accident) in the parking lot. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 110-11).

While the Plaintiff admits that Sgt. Fenninger testified that he was concerned for pedestrian traffic when the pursuit entered the shopping center, Sgt. Fenninger's concern for pedestrian traffic was unfounded as there was no pedestrian traffic in the parking lot and Sgt. Fenninger failed to request information pertaining to the vehicular and pedestrian traffic on the pursuit route. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Fenninger depo. at 34-39, 42-43).

Further, Fenninger admitted that he was authorizing the use of deadly force. (Fenninger depo. at 62-63). Fenninger further testified that under the CCSD Deadly Force

Policy, "Facts unknown to a Deputy, no matter how compelling, cannot be considered in later determination whether the use of lawful force, particularly deadly force, was justified." (*Id.* at 40; Scott depo. at Exhibit 12, pp. 82-83). Fenninger further testified that police work including the use of force must not be based on hunches, but particularized facts. (Fenninger depo. at 41). Despite these requirements, Fenninger authorized the use of deadly force without knowing anything about the dangers of the pursuit to third parties. (*Id.* at 60).

The Plaintiff denies that deadly force was appropriate under the circumstances as Fenninger authorized the use of deadly force without determining the nature of the underlying crime or whether the Plaintiff posed an immediate danger to the public. *Id.*

The Plaintiff admits that Sgt. Fenninger authorized the use of the PIT maneuver after the minor traffic accident between the Plaintiff and Scott. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff admits that Fenninger maintained radio contact with Scott and Reynolds after the accident. *Id.*

13.

Since Scott's vehicle was already damaged from the impact at the shopping complex, Scott assumed the lead position and approached the vehicle to perform the PIT maneuver. (Exhibit A, 66-22:47:21; 66-22:48:39). Due to the high rate of speed, Scott was unable to perform the PIT maneuver. Instead, he slowed his vehicle and tapped the rear bumper of Harris' vehicle. (Depo. of Scott, pp. 146-47). Scott decided to make direct contact with his push

bumper, while no other motorist were in the area. (Depo. of Scott, p.147). Harris' vehicle then left the roadway and crashed. (Exhibit A, 66-22:48:47).

RESPONSE: The Plaintiff admits that Scott took over as the lead vehicle in the pursuit after the accident in the parking lot. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff submits that Scott passed both Reynolds and Peachtree City Officer Ercole in his zealousness to become the primary unit in the pursuit. *Id.*

The Plaintiff denies that Scott was unable to perform the PIT maneuver because of his speed. The Plaintiff submits that Scott was never trained to perform the PIT maneuver, and, therefore, was unable to perform the PIT maneuver due to his lack of training. (Scott depo. at 137). In any event, the Plaintiff admits that the speeds were too great to properly perform or even attempt to perform a PIT maneuver.

The Plaintiff denies that Scott slowed his vehicle and tapped the rear bumper of the Plaintiff's vehicle, since it appears from the videotape that Scott sped up slightly in order to make contact. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

The Plaintiff further submits that ramming the Plaintiff's vehicle under the circumstances then and there existing amounted to the use of deadly and excessive force. (Yeager depo. at 58, 96; Kinsey depo. at 44; Fenninger depo. at 62-63; Scott depo. at 153, 157; Reynolds depo. at 117-120; Ercole depo. at 37-40).

The Plaintiff admits that at the time of the ramming (application of deadly), there were no motorists in the area

who were in fear of their life or personal safety. (See Defendants' Statement of Undisputed Facts at No. 13; Scott depo. at 147 and, Ex. 1; Reynolds depo. at 121-123; Ercole depo. at 28, 47; Fenninger depo. at 60). Accordingly, the Plaintiff submits that the Defendant's use of deadly force was improper as the Plaintiff posed no immediate threat to the officers or the public. (See article written by Defendants' Expert Mike Brave entitled "What is a Good Pursuit" – attached hereto as Exhibit "B"; Brave depo. at 171-72)

The Plaintiff admits that as a result of being rammed, his vehicle left the roadway and drove into off an embankment and into a drainage ditch, causing severe and permanent injuries to the Plaintiff (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

14.

The entire pursuit covered approximately nine miles, and lasted approximately six (6) minutes. (Exhibit A; Depo. of Reynolds, p.78). Although Harris has been rendered a quadriplegic, (Depo. of Harris, pp. 166-68), he fortunately survived, and no officer or third-parties were injured along the way as a result of his recklessness.

RESPONSE: The Plaintiff agrees that the pursuit covered 8 or 9 miles but denies that it lasted only 6 minutes because Defendant Reynolds' videotape indicates that the camera did not come on until some time after Reynolds had initiated the pursuit. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff admits that he was rendered a quadriplegic as a result of being rammed by Scott. The Plaintiff further

admits that no officer or third party was injured as a result of his driving. *Id.*

II. PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE TO BE TRIED

The following facts create a genuine issue for trial which cannot be resolved by summary judgment:

1. The vehicle that the Plaintiff was driving was registered in his name and at his proper address. (Accident Report attached hereto as Exhibit "A"; Harris depo. at 10).

2. During the course of the pursuit, Reynolds obtained the Plaintiff's vehicle's tag number. (Reynolds depo. at 81-83).

3. The reason for initiating the pursuit was for speeding – 73 mph in a 55 mph zone. (Reynolds depo. at 73-75).

4. Sgt. Fenninger did not have any pursuit training in basic training at POST. (Fenninger depo. at 9).

5. Deputy Scott had EVOC training[2], but no pursuit training. (Scott depo. at 16-18).

6. Deputy Scott never received any training on the CCSD policies and procedures, including the CCSD pursuit policy. (Scott depo. at 128-130).

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[2] EVOC refers to emergency vehicle operations training. This training focuses solely on the physical aspects of driving a vehicle in an emergency setting and not the philosophy of pursuits or pursuit policies. (Scott at 16-18).

7. Deputy Scott did not know whether he was required to comply with the CCSD policies and procedures. (Scott depo. at 128-130).

8. Deputy Reynolds, Scott and Fenninger had no training on the PIT maneuver. (Scott depo. at 137; Kinsey depo. at 22, 47).

9. Deputy Reynolds had EVOC training, but no pursuit training. (Reynolds depo. at 17).

10. Deputy Reynolds had no training on pursuits in basic training at POST. (Reynolds depo. at 37).

11. Deputy Reynolds had no training on pursuits at CCSD. (Reynolds depo. at 17, 29, 46-47).

12. There is an obvious need to provide training on pursuits and use of deadly force. (Yeager depo. at 32-34).

13. Sheriff Yeager and Coweta County never provided their officers with training on pursuits. (Yeager depo. at 36).

14. Sheriff Yeager and Coweta County provided deadly force training to their officers which consisted solely of firearm certification and familiarity with the firearms they use. (Yeager depo. at 35).

15. A police vehicle can be used as an instrument of deadly force. (Yeager depo. at 36; Fenninger depo. at 21; Scott depo. at 18, 21-22; Reynolds depo. at 31-32).

16. Sheriff Yeager and Coweta County failed to provide its officers with any training on the use of deadly force during the course of pursuits. (Yeager depo. at 37, 54).

17. Sheriff Yeager and Coweta County failed to provide their officers with any training concerning under what circumstances their officers can use deadly force. (Yeager depo. at 38-39).

18. Pursuant to the CCSD Use of Force Policy, Deadly Force is defined as "force which, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury." (Scott depo. at Ex. 12, p 82).

19. Deputy Scott requested authorization from his supervisor, Sgt. Fenninger to PIT the Plaintiff's vehicle. (Scott depo. at 142-144; Fenninger depo. at 54-55).

20. As a supervisor, Fenninger was required to find out information about the pursuit concerning the charges, speeds, traffic conditions, etc. and that Fenninger failed to properly determine the charges and traffic conditions prior to receiving the request to use the PIT maneuver by Scott. (Fenninger depo. at 34-37).

21. Despite not performing his supervisory duties by determining the nature of the underlying offense and the presence of pedestrian or vehicular traffic, Fenninger responded to Scott's request for permission to PIT by stating over the radio, "Go ahead and take him out. Take him out." (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Fenninger depo. at 54-55).

22. Under the circumstances then and there existing, Scott requested permission to use deadly force as death or serious bodily injury could result from intentionally ramming the Plaintiff's vehicle. (Yeager depo. at 58, 96; Kinsey depo. at 44; Fenninger depo. at 62-63; Scott

depo. at 153, 157; Reynolds depo. at 117-120; Ercole depo. at 37-40).

23. Further, Fenninger testified that when he authorized Scott to "take out" the Plaintiff, he was expressly authorizing the use of deadly force. (Fenninger depo. at 62-63).

24. Further, at the time of the ramming (application of deadly), there were no motorists in the area who were in fear of their life or personal safety. (See Defendants' Statement of Undisputed Facts at No. 13; Scott depo. at 147 and Ex. 1; Reynolds depo. at 121-123; Ercole depo. at 28, 47; Fenninger depo. at 60).

25. The application of deadly force was inappropriate under the circumstances then and there existing. (Alpert Aff., Expert Rep. at 11; Ercole depo. at 34-35; Article written by Defendants' expert Mike Brave entitled "What is a Good Pursuit" attached hereto as Exhibit "B").

26. Sheriff Yeager and Coweta County have 80 sworn officers and no internal affairs division. (Yeager depo. at 87).

27. Sheriff Yeager and Coweta County did not investigate this incident. (Scott depo. at 193-194; Reynolds depo. at 130).

28. Sheriff Yeager and Coweta County do not keep records or statistics on pursuits. (Yeager depo. at 125-126).

29. Sheriff Yeager and Coweta County have never fired an officer for improper use of force or violation of the pursuit policy. (Yeager depo. at 152).

30. The conduct of Scott, Reynolds and Fenninger in this action was in compliance with the policies, practices and customs of Sheriff Yeager and Coweta County. (Defendants' Response to Plaintiff's First Request for Admissions, No. 6 thru 9; Depo. of Kinsey at 7-8, 39, and Ex. 1; Fenninger depo. at 67-70).

31. Deputy Scott, Deputy Reynolds and Sgt. Fenninger were not investigated, reprimanded or disciplined for their actions in this incident. (Scott depo. at 193-194; Reynolds depo. at 130; Fenninger depo. at 67-70).

32. The injuries sustained by the Plaintiff were caused by the policies, practices and customs of Sheriff Yeager and Coweta County. (Alpert Aff., Expert Rep. at 10-12).

33. The injuries sustained by the Plaintiff were caused by the failure of Sheriff Yeager to train its deputies with respect to high speed pursuits and the proper use of deadly force. (Alpert Aff., Expert Rep. at 9-12).

34. The injuries sustained by the Plaintiff were caused by the failure of Sheriff Yeager and Coweta County to provide proper pursuit and deadly force policies to its deputies. (Alpert Aff., Expert Rep. at 10-12).

35. The injuries sustained by the Plaintiff were caused by the failure of Sheriff Yeager and Coweta County to properly investigate and discipline its deputies. (Alpert Aff., Expert Rep. at 10-12).

36. Defendants' expert, Mike Brave, has written an article entitled, "What is a Good Pursuit?" (Brave depo. at 171-172; Article attached hereto as Exhibit "B").

37. Mr. Brave's article, "What is a Good Pursuit?" indicates that the use of deadly force to apprehend a fleeing suspect in circumstances similar to the facts of the instant case is unconstitutional. (Brave depo. at 171-172; Article attached hereto as Exhibit "B").

38. The patrol car used by Defendant Scott to ram Victor Harris was owned and insured by Coweta County. (Accident report attached hereto as Exhibit "A").

39. At the time of this incident, Coweta County maintained liability insurance policies providing $1 million in automobile liability coverage, $2 million in law enforcement liability coverage, and $3 million in public official liability coverage ($6 million) which are applicable to the Plaintiff's claims against the Defendants for damages arising from the ownership, use, operation and/or maintenance of motor vehicles. (See liability policies attached hereto as Exhibit "C").

40. Portions of the pursuit of Victor Harris, as well as conversations and events at the crash immediately thereafter, are depicted by the videotapes made by the Peachtree City patrol cars driven by Sgt. Brown and Cpl. Ercole. (See the single videotape attached hereto as Exhibit "D", which contains the video recordings made by both patrol cars).

Respectfully submitted this 14 day of November, 2002.

/s/ Craig T. Jones
Craig T. Jones
Ga. Bar No. 399476
Attorney for Plaintiff

CRAIG T. JONES, P.C.
P.O. Box 1065
Decatur, Georgia 30031-1065
(404) 373-6315

/s/ Andrew C. Clarke
by Craig T. Jones w/permission

Andrew C. Clarke
Tenn. Bar No. 15409)

Attorney for Plaintiff

BAILEY & CLARKE
6256 Poplar Avenue
Memphis, Tennessee 38119
(901) 680-9777

[Certificate Of Service Omitted In Printing]

[Exhibits Omitted In Printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VICTOR HARRIS, Plaintiff, v. COWETA COUNTY, GEORGIA, SHERIFF MICHAEL S. YEAGER, SGT. MARK FENNINGER, DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY SCOTT, Defendants.	CIVIL ACTION FILE NO. 3:01-CV-148-WBH

ORDER

(Filed Sep. 25, 2003)

Before the Court is Defendants' motion for summary judgment [36]. Also before the Court is Defendants' motion to amend answer [65], which is granted as unopposed. For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

As this case is before the Court on Defendants' motion for summary judgment, the Court must view the facts in the light most favorable to Plaintiff, the non-movant. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993). Viewed in this light, the following facts emerge.

The chase

At 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's Office was stationed on Highway 34 when he clocked Plaintiff Victor Harris's vehicle traveling at 73 miles per hour in a 55 miles-per-hour zone. The vehicle that Harris was driving was registered in Harris's name and at his proper address. Although Reynolds flashed his blue lights, Harris refused to slow down and continued driving. According to Harris, he refused to stop because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car.

Reynolds made a decision to pursue Harris, and followed the vehicle in the direction of Peachtree City, using his flashing lights in an attempt to get Harris to stop. Just past Sullivan Road, Reynolds caught up with Harris and turned on his lights and siren, which activated his video camera. Harris still refused to stop and then sped up, beginning a high-speed chase. Harris admits that during the course of the pursuit, he drove well in excess of the speed limits, passed vehicles on a double yellow line, and ran a red light at the intersection of Highway 34 and Fisher Road. Despite these traffic violations, Plaintiff contends that he used his turn signals when passing or turning, and maintained control over his vehicle.[1]

After Harris refused to stop, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle, and he broadcast its license plate number. Reynolds did

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[1] The speed of the chase is disputed. Defendants contend that it was in excess of 100 miles per hour. Plaintiff denies that he drove that fast, but agrees that Scott, in his "overzealousness to join the pursuit" drove his cruiser at speeds well over 100 miles per hour.

not, however, broadcast the underlying charge (speeding). Although not specifically requested to join the pursuit, Coweta County Deputy Chuck Scott heard Reynolds' radio communication and decided to join the pursuit.

After crossing into Peachtree City, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex. Reynolds followed Harris as he drove through the parking lot toward Highway 74 while Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74. The parties dispute what happened next. According to Harris, Scott drove his vehicle directly into Harris's path, while Reynolds was in pursuit from behind. When he realized that Scott was in his lane of traffic, Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came in contact with each other, causing minor damage to Scott's cruiser.[2] Harris then entered Highway 74 and continued to flee at a high speed. At that time, Sgt. Mark Brown of the Peachtree City Police Department ordered his fellow Peachtree City officers to block intersections from cross-traffic.

As the pursuit continued through Peachtree City, Scott took over as the lead vehicle. After leaving the parking lot and getting on Highway 74, Scott requested and obtained approval from his supervisor, Sergeant Mark Benninger, to make physical contact with Harris's vehicle

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[2] Defendants assert that Harris was boxed in by the officers and deliberately rammed Scott's cruiser in an attempt to get away. Harris maintains that the crash was unintentional.

in what is termed a "PIT" maneuver.[3] Although unaware of the underlying offense of which Harris was suspected, Scott wanted to use the PIT maneuver to end the chase as soon as possible because he felt that Harris was acting in a reckless and extremely dangerous manner. At the time the request was made, there were no motorists or pedestrians in the area, which was due, in part, to the Peachtree City officers' decision to blockade intersections.

While it is disputed whether Fenninger knew about the collision between Harris and Scott in the parking lot, the evidence indicates that Fenninger was concerned about the safety of pedestrians and felt that Harris had to be stopped. In granting Scott permission to make contact with Plaintiff's vehicle, Fenninger stated over the radio, "Go ahead and take him out. Take him out" According to Harris's version of the facts, Fenninger was never made aware that the pursuit originated with a speeding violation.

After receiving approval from Fenninger to make contact with Harris's vehicle, Scott determined that he could not perform the PIT maneuver because he was going too fast. Scott then decided to hit Harris's bumper, presumably in a manner different from a PIT maneuver. The parties dispute whether Scott slowed down or sped up, but they agree that he ran his cruiser into Harris's vehicle, causing Harris to lose control. Harris's vehicle left the roadway, ran down an embankment, and crashed. As a

[3] A PIT maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point which throws the car into a spin the driver cannot control, bringing the car to a stop.

result, Harris was rendered a quadriplegic. No one else was injured.

Coweta County's policies

Under the vehicle pursuit policy of the Coweta County Sheriff's Office in effect at the time of the incident, decisions regarding the initiation, continuation, and termination of pursuits were left to the discretion of the officer and supervisor in the field. Specifically, the policy states that "the pursuing deputy should keep in mind his personal safety and try everything within his authority to apprehend the violator without resorting to a high-speed chase." This type of policy, which leaves the decision about pursuits to the discretion of the officer in the field and the supervisor, is called a "judgmental policy." Across the country, a majority of police departments had such judgmental policy in force at the time of the incident involving Harris.

Included in the pursuit policy is a provision that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Additionally, the policy states that the officer should discontinue the pursuit when "upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public" or "upon receipt of additional information once the pursuit has begun that would allow later apprehension and successful prosecution."

Training

It is undisputed that Coweta County Sheriff's Deputies had all of the training required by the State of Georgia, including emergency vehicle operations ("EVOC") training. EVOC training focuses solely on the physical aspects of driving a vehicle in an emergency setting and not on the philosophy of pursuits or pursuit policies. The County also required its officers to have an additional twenty hours of training. The County, however, did not provide any training in high-speed pursuits or the use of deadly force other than that included in basic officer training provided by the state police academy. The only deadly force training provided to Coweta County officers related to firearms. Although the pursuit policy authorized the deputies to make "deliberate physical contact between vehicles" under certain circumstances, the officers were not trained in how to determine whether to make such contact or in how to safely make such contact. Additionally, Scott admitted that he never received any training on the County's policies and procedures, including the pursuit policy.

The lawsuit

On October 16, 2001, Harris filed a Complaint against Scott, Reynolds, and Fenninger, as well as Coweta County and Sheriff Michael Yeager. Pursuant to 42 U.S.C. § 1983, Harris alleges a violation of his rights under the Fourth and Fourteenth Amendments. Furthermore, under state law, he asserts claims under the Georgia Constitution as well as various common law tort claims.

In his response to the motion for summary judgment, Harris concedes that summary judgment is appropriate on

the following claims: all claims against Reynolds, all state law claims against Sheriff Yeager, and all other state law claims except for the negligence and battery claims against Scott, Fenninger, and Coweta County. The Court will address each of the remaining claims in turn.

DISCUSSION

Summary judgment standard

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant carries the initial burden and must show that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

Defendants' motion

I. Federal Claims

A. Fourth Amendment claim against Defendant Scott

In Count I of his Complaint, Harris alleges that Defendant Scott violated his Fourth Amendment rights by using excessive force to stop his vehicle. "The first step in reviewing an excessive force claim is to determine whether the plaintiff was subjected to the 'intentional acquisition of physical control' by a government actor – that is, whether there was a 'seizure' within the meaning of the Fourth Amendment." *Vaughan v. Cox,* No. 00-14380, 2003 U.S. App. LEXIS 18066, at *9-10 (11th Cir., August 29, 2003) (quoting *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989)). The Supreme Court has held that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower,* 489 U.S. at 597. It is clear to the Court that the *Brower* standard has been met in this case. Scott rammed Harris's vehicle for the purpose of stopping it, and the ramming did, in fact, cause the vehicle to come to a stop. A seizure, therefore, occurred.[4]

Having concluded that Harris was subjected to a seizure, the Court now turns to the merits of Harris's Fourth Amendment claim that he was subjected to an unreasonable seizure because of Scott's use of excessive force. Such claims are subject to an objective reasonableness inquiry: "the

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[4] Defendants essentially concede that a seizure occurred. In their brief, they argue that officers Reynolds and Fenninger did not seize Plaintiff, but they do not include Scott in this argument. *See* Defs.' Br. [36] at 10-12.

question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

In their motion, Defendants argue that there was no constitutional violation because Scott's use of force was non-deadly and was objectively reasonable.[5] They contend

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[5] In support of this argument, Defendants rely exclusively upon dicta from *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992); *rev'd,* 998 F.2d 923 (11th Cir. 1993 (per curiam). In *Adams,* the defendant officer intentionally rammed a fleeing misdemeanant several times following a high-speed pursuit through a residential neighborhood, and the final blow caused the car to go out of control. The car crashed, and the passenger was killed. The Eleventh Circuit struggled with this case, initially affirming the denial of summary judgment on qualified immunity grounds, *see* 962 F.2d at 1572, and then issuing a subsequent opinion reversing the denial of summary judgment for the reasons set forth in Judge Edmonson's dissent in the original opinion, *see* 998 F.2d 923. Judge Edmonson reasoned that the officers were entitled to qualified immunity because in 1985, the law was not clearly established that ramming a vehicle constituted a seizure. *See id.* at 1576. He then goes on to opine that ramming a fleeing vehicle did not constitute a violation of the Fourth Amendment. *See id.* at 1577.

In the two-sentence second opinion, the Court did not adopt Judge Edmonson's dissent as its opinion, but rather reversed the district court based on the "reasoning" of the dissent. This Court concludes that the

(Continued on following page)

that Harris presented a significant danger because he was driving recklessly at high speeds and had hit Scott's vehicle. Plaintiff responds that Scott used deadly force, and that such force was unreasonable because Harris was a traffic offender, and the officers could have used alternative means to arrest him at a later time.

Regardless of whether the force was deadly or not, Harris's excessive force claim is judged by the "objective reasonableness" standard set forth in *Graham v. Connor*. *See* 490 U.S. 395.[6] *Graham* instructs that the Court must examine the facts carefully and provides three examples of questions relevant to the inquiry: (1) how severe was the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was attempting to evade arrest by flight. *See Graham*, 490 U.S. at 396. Applying the *Graham* analysis to the facts of this case, the Court concludes that a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force.

The central fact that guides this Court's decision is that, prior to Reynolds' decision to instigate a high-speed

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reasoning of the dissent focused on qualified immunity and whether the law with respect to seizures was clearly established. Thus, Judge Edmonson's discussion of whether ramming a vehicle constitutes a Fourth Amendment violation is dicta. Moreover, the Court's "reasoning" with respect to qualified immunity is called into question by the Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), and the Eleventh Circuit's recent decision in *Vaughan*, 2003 U.S. App. LEXIS 18066.

[6] Because the "objective reasonableness" standard applies regardless of whether the force applied was deadly or not, this Court need not decide whether Scott used deadly force.

chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone. A rational fact finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others. The record does not reflect that he had menaced or was likely to menace others.

Defendants do not address this point in their brief, rather focusing exclusively on Harris's conduct during the chase. The Court is mindful that traffic laws are designed for public safety and that by breaking these laws – by speeding, improper passing, and even failing to stop – Harris acted in an unsafe manner; however, the record reflects that he maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road. With the exception of the incident with Scott's vehicle in the parking lot, which is addressed below, Harris did not use his vehicle in an aggressive manner.

Defendants argue that the crash in the parking lot between Harris's car and Scott's cruiser demonstrated that Harris presented a significant danger to others. Viewing the facts in Harris's favor, however, it appears that either Scott hit Harris, or that the crash was an accident. According to the official report submitted by Sgt. Mark Brown of the Peachtree City Police Department as well as the testimony of Harris, Scott rammed Harris's car. These facts rebut Defendants' assertion that Harris aggressively used his vehicle to strike Scott's cruiser. Additionally, the decision to ram the vehicle came minutes later, when Harris was driving away from officers, and when there were no other motorists or pedestrians nearby, thus casting doubt on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm

to others. Finally, the Court has also considered the fact that the officers had the license plate number for Harris's vehicle, and the vehicle had not been reported stolen. Reasonable officers, therefore, would have known that they could have followed up on the license plate information at a later time.

Under this version of the facts, a fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force – ramming the car while traveling at high speeds – was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. *See Vaughan,* 2003 U.S. App. LEXIS 18066, at *16 (stating that a reasonable jury could conclude that an officer's use of deadly force against two fleeing suspects was unreasonable where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.") Thus, a fact issue remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris.

Having concluded that the facts alleged could establish a constitutional violation, the Court now turns to Scott's defense of qualified immunity. In deciding whether Scott is protected by qualified immunity, the Court must determine whether Harris's rights were clearly established – that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful. *See Saucier v. Katz,* 533 U.S. 194, 201-202 (2001). "It is well-settled that a constitutional right is clearly established only if its

contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Vaughan,* 2003 U.S. App. LEXIS 18066, at *19 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). Thus, "qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful." *Lee v. Ferraro,* 284 F.3d 1188, 1200 (11th Cir. 2002). The Supreme Court, however, has cautioned that in applying the qualified immunity analysis, courts should not be unduly rigid, but rather should see if the law gave the defendant "fair warning" that the alleged conduct was unconstitutional. *See Hope v. Pelzer,* 536 U.S. 730, 741 (2002).

At the time of the incident, the law was clearly established that the level of force appropriate in a situation depended, at least in part, on the crime that the fleeing suspect was thought to have committed. *See Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985) (setting forth the standard for the use of deadly force to subdue a fleeing felon and recognizing that common law prohibited the use of deadly force to apprehend a misdemeanant); *Graham,* 490 U.S. at 396 (stating that one of the factors that an officer should consider is the severity of the crime in issue). In the present case, the facts indicate that Scott did not know the underlying charge when he decided to join in the chase or at the time that he rammed the vehicle. Defendants rely heavily upon the crash in the parking lot to show that Harris was dangerous, but the evidence, when viewed in Harris's favor, indicates that a large part of the responsibility for the parking lot incident rests with Scott who deliberately drove into Harris's line of traffic. Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is

quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury. *Anderson,* 477 U.S. at 251-52. Defendants' motion for summary judgment on this claim is DENIED.

B. Fourth Amendment claim against Defendant Fenninger

It is undisputed that, at the time Scott rammed Plaintiff's car, his supervisor, Defendant Fenninger, was miles away from the accident. "Supervisory officials are not liable under section 1983 on the basis of respondeat superior or vicarious liability." *Hardin v. Hayes,* 957 F.2d 845, 849 (11th Cir. 1992). To recover individually from a person such as Fenninger in a supervisory administrative capacity, the plaintiff must show that the supervisor is liable either through personal participation in the acts comprising the alleged constitutional violation, or the existence of a causal connection linking the supervisor's actions with the violation. *See Hill v. DeKalb Regional Youth Detention Ctr.,* 40 F.3d 1176, 1192 (11th Cir. 1994) (overruled in part by *Hope v. Pelzer,* 536 U.S. 730, 739 n.9 (2002)).

Here, Plaintiff argues that Fenninger is liable for the Fourth Amendment violation because he explicitly authorized Scott to use unreasonable force to stop the vehicle, and, therefore, personally participated in the use of excessive force. Defendants respond that Fenninger cannot be held liable because he did not effect a "seizure" of the vehicle.

The evidence shows that Scott requested and obtained approval from Fenninger to make physical contact by executing a PIT maneuver. Fenninger granted permission without inquiring about the underlying crime for which Harris was being pursued, and without asking whether there were any motorists or pedestrians in the area. Fenninger authorized the force, even though neither he nor Scott were trained in how to safely carry it out. In granting Scott permission to undertake this dangerous act, Fenninger stated over the radio, "Go ahead and take him out. Take him out."

The Court agrees with Plaintiff that, to the extent a jury may find a Fourth Amendment violation on the part of Scott, they may also find that Fenninger is liable because he personally participated in the decision to use the excessive use of force by explicitly authorizing it. The fact that he was not physically present at the scene does not absolve him of liability, since a reasonable inference can be drawn that but for his authorization, Scott would not have struck Plaintiff's vehicle. Defendants' motion for summary judgment on this claim is DENIED.[7]

C. Fourteenth Amendment claim against Defendants Scott and Fenninger

It appears that Plaintiff brought the Fourteenth Amendment claims as alternatives to his Fourth Amendment claims. *See* Pl.'s Br. at 16-17 (stating that the Court

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[7] Defendants do not specifically argue that Fenninger is entitled to qualified immunity, but the Court has considered this issue. For the same reasons that Scott is not entitled to qualified immunity as a matter of law, the Court concludes that Fenninger is not entitled to qualified immunity as a matter of law.

need not address the Fourteenth Amendment claims if it finds a Fourth Amendment violation). Because the Court has denied Defendants' motion for summary judgment on the Fourth Amendment claims, the Court need not address Plaintiff's Fourteenth Amendment claims, and Defendants' motion for summary judgment with respect to these claims, therefore, is GRANTED.[8]

D. Individual liability against Sheriff Yeager

Plaintiff concedes that Sheriff Yeager did not personally participate in any actions leading to the seizure of Harris, but he contends that Sheriff Yeager may be held liable in his individual capacity for acts or omissions which proximately led to the violation of Harris's rights. Specifically, Plaintiff claims that the Sheriff should have trained his deputies in how to conduct high speed chases, in how to safely effect ramming techniques such as the PIT maneuver, and in how to determine when chases and ramming techniques are appropriate. In some situations, supervisors may be held liable for failing to train and supervise their subordinates adequately. *See Dolihite v. Maughon by and through Videon*, 74 F.3d 1027, 1052 (11th Cir. 1996).

Even assuming, for purposes of this Order, that there was a causal connection between Sheriff Yeager's failure to

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[8] Additionally, the Court concludes that the Fourteenth Amendment claim, based on Scott's alleged conscience-shocking conduct, lacks merit. There is no evidence that Scott had "a purpose to cause harm unrelated to the legitimate object of arrest." *See Lewis*, 523 U.S. at 836; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (stating that the Fourteenth Amendment applies to high-speed pursuits only if there has been no seizure to implicate the Fourth Amendment).

train and Plaintiff's injuries, this claim fails because the Sheriff is entitled to qualified immunity. The undisputed evidence shows that Coweta County Sheriffs Deputies had all of the training required by the State of Georgia. Plaintiff cites to no law or constitutional right that required Sheriff Yeager to train his employees in the manner suggested by Plaintiff. In the absence of such authority, Sheriff Yeager is entitled to immunity from suit. *See Riley v. Newton*, 94 F.3d 632, 637 (11th Cir. 1996) (granting to sheriff summary judgment on qualified immunity grounds and distinguishing the qualified immunity standard for failure to train claims from the standard applicable to such claims against municipalities). Defendants' motion for summary judgment on this claim is GRANTED.

E. Municipal liability against Coweta County[9]

In order for Harris to make out a claim for municipal liability under Section 1983, he must identify a municipal policy or custom that caused his injury. See *Grech v. Clayton County*, 335 F.3d 1326, 1329 (11th Cir. 2003). To establish a county policy, a plaintiff may identify either an officially-promulgated county policy or an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county.

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[9] Harris has also sued Sheriff Yeager and the deputies in their official capacities. A claim against these defendants in their official capacities is the same as a claim against Coweta County. *See Kentucky v. Graham*, 473 U.S. 159 (1985). Because suits against county officials in their official capacities are the functional equivalent of a suit against the county, there is no need to bring official-capacity actions against local governmental officials. Defendants' motion for summary judgment on these claims, therefore, is GRANTED. *See Busy v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991).

See id. "Because a county rarely will have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs, . . . must show that the county has a custom or practice of permitting it and that the county's custom or practice is the moving force behind the constitutional violation." *Id.* (internal quotations omitted). Plaintiff has articulated two theories for municipal liability: (1) the County had an unconstitutional policy of engaging in high-speed chases to pursue fleeing offenders which is evidenced by the County's failure to discipline its officers and others involved in similar incidents; and (2) the County's failure to properly train and supervise its officers in the face of an obvious need to train constitutes deliberate indifference to the safety of county residents.

1. Failure to discipline

Harris contends that Coweta County has an informal policy or custom allowing its deputies to engage in high-speed chases and use deadly force in inappropriate circumstances. Plaintiff's expert opined that "the custom and practice of the Coweta County Sheriff's Office is to ratify and encourage the use of deadly force against fleeing offenders without regard for the underlying offense or the immediacy and severity of the treat posed by the offender." As evidence of this informal policy or custom, Plaintiff relies upon the fact that the officers involved in this case were not disciplined and that Defendants have admitted the officers violated no official county policy. Plaintiff's expert also states that the County was on notice of this problem because of two prior incidents involving a deputy named Cox, who he claims had been involved in two prior pursuits in which deadly force was used against violators who were not suspected of violent felonies.

Defendants respond, and the Court agrees, that Plaintiff has not presented sufficient evidence to make out a claim against Coweta County on this basis. First, Plaintiff has presented no evidence that any officially-adopted policy was unconstitutional. Rather, Plaintiff's evidence is that the County's high-speed pursuit policy, described as a "judgmental policy," is widely used throughout the country, and in fact is adopted by the majority of the jurisdictions.

Second, Plaintiff has not presented sufficient evidence that there was any unofficial custom or practice of engaging in high-speed chases and improperly using excessive force. Plaintiff's expert referenced only two prior high-speed pursuits, and presented no specific evidence regarding the facts of these two incidents.[10] Vague references to two prior incidents do not constitute ratification and encouragement of an unconstitutional policy. *See Bannum, Inc. v. City of Ft. Lauderdale*, 901 F.2d 989, 998 n.29 (11th Cir. 1990) (noting that an employee's unconstitutional decisions must have been made repeatedly to have become a "custom or usage" of which his or her supervisor must have known and approved.); *see also Gilmere v. Atlanta*, 737 F.2d 894, 904-05 (11th Cir. 1984) ("occasional acts of untrained policemen standing alone are not attributable to city policy or custom). Additionally, the failure of the County to discipline the officers

[10] The Court, of course, is familiar with the facts of at least one of Deputy Cox's high-speed chases, which are recounted in the various opinions issued by the Eleventh Circuit. *See e.g. Vaughan*, 2003 U.S. App. LEXIS 18066. The Court, however, does not have sufficient facts before it to determine, as a matter of law, that the County had a custom or practice of permitting such chases or permitting the inappropriate use of deadly force. Moreover, Plaintiff has presented no competent evidence concerning the County's alleged failure to discipline Cox.

or conduct an investigation into this particular incident is insufficient evidence to establish a custom. Without evidence that the County persistently failed to discipline officers for such known unconstitutional conduct, such a policy cannot be inferred from the County's isolated decision not to discipline the officers involved in this incident. *See McQurter v. City of Atlanta*, 572 F. Supp. 1401, 1420 (N.D. Ga. 1983) (Forrester, J.) (internal citations omitted) (refusing to infer a policy of using excessive force based on evidence of a failure to discipline in one case only). For these reasons, Defendants' motion for summary judgment on this claim is GRANTED.

2. Failure to train

A municipality can be held liable under Section 1983 for inadequately training or supervising its employees only in limited circumstances. The inadequate training or supervising must evidence the municipality's "deliberate indifference" to the rights of the inhabitants so as to amount to a policy or custom that is actionable under Section 1983. *See Gold v. City of Miami, Fla.*, 151 F.3d 1346, 1350 (11th Cir. 1998) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989)). Deliberate indifference is shown by "evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Id.*

One of the ways a plaintiff may demonstrate a county's deliberate indifference is by showing that the need for a particular type of training is obvious, even without prior incidents to place the municipality on notice. *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1172 (11th Cir.

1995). One example of such an obvious need is the use of deadly force where firearms are provided to police officers. *See Gold*, 151 F.3d at 1351 Here, Plaintiff argues, and the Court agrees, that there was an obvious need for training with respect to high-speed chases since the Coweta County officers were vested with the discretion to embark on high-speed chases and were allowed to ram vehicles under certain circumstances.[11] Indeed, the official pursuit policy authorized this conduct.

At his deposition, Sheriff Yeager testified that high-speed pursuits and PIT maneuvers are high risk activities that create an obvious need for training. Plaintiff's expert has also opined that pursuit driving and ramming techniques such as that used by Scott against Harris are high-risk activities which obviously require training. Thus, the Court concludes that Plaintiff has provided sufficient evidence to create a fact issue as to whether – giving a police officer a vehicle and the discretion to use it in an offensive – and perhaps deadly – manner creates a need to train that is 'so obvious' that, even without notice of prior constitutional violations, the County had a duty to train. *See Gold*, 151 F.3d at 1352; *see also Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000) (finding that the need to train officers in how to make arrests with force is so obvious that the failure to train in this area amounts to deliberate indifference to constitutional rights). Thus, a

[11] While the Court has discounted Plaintiff's vague evidence regarding prior incidents, the facts of *Vaughan* demonstrate that, at the time of the incident involving Harris, Coweta County certainly knew that its officers had the means as well as the discretion to embark on dangerous high-speed chases and to use force during those chases.

fact issue remains on the issue of whether the County's failure to train amounted to deliberate indifference.

As a final argument, Defendants respond that Plaintiff has failed to present competent evidence that the lack of training was the "moving force" behind, i.e., directly caused, the injuries suffered by Harris. The Court is not persuaded by this argument. A reasonable inference can be drawn from Plaintiff's evidence that a training course would have taught the officers to consider the underlying offense and whether other means – such as tracing the license plate number – could be used to capture the suspect at a later time. Another reasonable inference is that, had the officers attended such a training course, they would have considered these factors, applied them in a reasonable manner, and decided against ramming Harris's car, and perhaps even against embarking on the chase in the first place.

Given these conclusions, the Court finds that Harris has carried his summary judgment burden of showing that the County's failure to train its officers constituted a policy decision for which the County can be held liable under Section 1983. Defendants' motion for summary judgment on this claim, therefore, is DENIED.

II. State Claims

A. Negligence and battery claims against Defendants Scott and Fenninger

Plaintiff alleges that Scott was negligent by (1) attempting a PIT maneuver at high speeds on a two-lane road without any training; (2) operating his vehicle in an unsafe manner; and (3) ramming Plaintiff's vehicle. Plaintiff alleges that Fenninger was negligent in authorizing Scott's

conduct without first obtaining the information necessary to evaluate the situation and make a proper decision. Defendants do not dispute that Plaintiff has made out a prima facie case of negligence, but rather respond that the officers are entitled to official immunity.

County employees are immune from liability unless they negligently perform ministerial tasks or act with actual malice in perforating discretionary tasks. *See* Ga. Const. of 1983, Art. I, Sec. II, Par. IX(d); *Gilbert v. Richardson*, 264 Ga. 744, 747 (1994). The decision to make an arrest is a discretionary act. *See Anderson v. Cobb*, 258 Ga. App. 159, 160 (2002). Plaintiff contends that his evidence supports a finding that Defendants Scott and Fenninger acted with actual malice because (1) both officers admit that the ramming of the car was deliberate and likely to cause harm and (2) Fenninger stated "take him out."

The evidence in this case demonstrates that Scott and Fenninger's intention was to stop Plaintiff's car – not to injure him. While Plaintiff may credibly argue that the officers violated his constitutional rights, his evidence simply does not support a conclusion that the officers intended to harm him. *See Anderson*, 258 Ga. App. at 160 (stating "[i]ll will alone is insufficient to establish actual malice; [the plaintiff] must show that [the defendant] acted with the deliberate intent to commit a wrongful act or with the deliberate intent to harm [him]."). In the absence of evidence of actual malice, Scott and Fenninger are immune from the state law claims, and Defendants' motion for summary judgment on these claims is GRANTED.

B. Negligence claim against Coweta County

Despite the general rule that counties have sovereign immunity from tort claims, Plaintiff asserts that Coweta County nevertheless can be held liable for the state-law torts allegedly committed by Defendants Scott and Fenninger because Coweta County has waived its immunity pursuant to O.C.G.A. § 33-24-51. That Code section provides, in part, that:

> The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived as provided in Code Section 36-92-2. Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase the insurance authorized by subsection (a) of this Code section to provide liability coverage for the negligence of any duly authorized officer, agent, servant, attorney, or employee in the performance of his or her official duties in an amount greater than the amount of immunity waived as in Code Section 36-92-2, its governmental immunity shall be waived to the extent of the amount of insurance so purchased. Neither the municipal corporation, county, or political subdivision of this state nor the insuring company shall plead governmental immunity as a defense; and the municipal corporation, county, or political subdivision of this state or the insuring company may make only those defenses which could be made if the insured were a private person.

O.C.G.A. 33-24-51(b). Thus, by purchasing liability insurance to cover the negligence of county employees arising from the use of a motor vehicle, a county waives sovereign immunity pursuant to O.C.G.A. § 33-24-51(b), but only to

the extent of the amount of insurance. *See Woodard v. Laurens County*, 265 Ga. 404, 406 (1995).[12]

Here, it is undisputed that Coweta County maintains insurance to cover it and its employees for any state tort liability arising from the use of county vehicles driven by its sheriff's deputies. It is also undisputed that the vehicle driven by Scott was owned by Coweta County and was covered by the County's insurance. It is clear to the Court that, pursuant to O.C.G.A. § 33-24-61(b), Coweta County has waived sovereign immunity with respect to Plaintiff's negligence claims against Defendants Scott and Fenninger.

Defendants next argue that even if there is a waiver of sovereign immunity, the general negligence standard does not apply and that Plaintiff must show that the officers acted with "reckless disregard" of public safety. In support of this argument, Defendants rely upon O.C.G.A. § 40-6-6 which, among other things, governs the operation of a law enforcement vehicle when pursuing a suspected law violator. This code section gives police officers authority to proceed past a red signal or stop sign after slowing down, exceed the maximum speed limits so long as life and property are not endangered, and disregard regulations governing direction. See O.C.G.A. § 40-6-6(b). "By these provisions, the legislature intended to grant police officers and drivers of emergency vehicles exceptional rights in operating motor vehicles, but also to protect travelers from

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[12] Plaintiff asserts that sovereign immunity is waived not only for the negligent acts of county employees, but also for the intentional torts of those employees, but he has provided no authority for this position. Accordingly, Defendants' motion for summary judgment on all state law claims other than negligence against the County is GRANTED.

an officer's or driver's reckless disregard of the public's safety on the highways." *Cameron v. Lang*, 274 Ga. 122, 127-28 (2001). The code section also specifically addresses police pursuits:

> When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, ***the law enforcement officer's pursuit*** shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with ***reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit.*** Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.

O.C.G.A. § 40-6-6(c)(2) (emphasis supplied).

Plaintiff responds, and the Court agrees, that this statute is inapplicable to the present case. The statute specifically provides that "the law enforcement officer's pursuit" shall not be the proximate cause of an injury unless the officer acts with reckless disregard. Here, Plaintiff's negligence claim is not based on the officers' decision to initiate and pursue the chase; rather, it is based on the officers' decisions to ram Plaintiff's vehicle. Moreover, section § 40-6-6(b) provides law enforcement officers with specific "exceptional rights," and the right to ram another car is not listed as one of those rights.

As stated previously, Defendants do not dispute that Plaintiff has made out a prima facie case of negligence. The Court concludes that Plaintiff has provided sufficient evidence to make out a prima facie case of negligence against Scott for ramming Plaintiff's vehicle at high speeds on a two-lane road without any training and against Fenninger for authorizing Scott's allegedly negligent use of his county vehicle without first obtaining the information necessary to evaluate the situation and make a proper decision. Accordingly, Defendants' motion for summary judgment on the negligence claim against Coweta County is DENIED.

CONCLUSION

Defendants' motion for summary judgment [36] is GRANTED IN PART and DENIED IN PART. After this ruling, the following claims remain pending: Fourth Amendment claim against Defendants Scott and Fenninger in their individual capacities; municipal liability claim for failure to train against Coweta County; and negligence claim against Coweta County based on the acts of Defendants Scott and Feininger. All other claims are hereby dismissed.

Defendants' motion to amend their answer [65] is GRANTED AS UNOPPOSED.

It is so ORDERED this 25 day of September, 2003.

/s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States
District Court

433 F.3d 807

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15094

D. C. Docket No. 01-00148-CV-WBH-3

VICTOR HARRIS,

Plaintiff-Appellee,

versus

COWETA COUNTY, GEORGIA, et al.,

Defendants,

MARK FENNINGER, Sgt.,
TIMOTHY C. SCOTT, Deputy,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed December 23, 2005)

ON PETITION FOR REHEARING

Before BIRCH, BARKETT and COX, Circuit Judges.

BARKETT, Circuit Judge:

We *sua sponte* grant rehearing in this case, vacating our prior opinion, 406 F.3d 1307 (11th Cir. 2005), in its entirety and substituting the following in its place.

Coweta County Deputy Timothy Scott ("Scott") and Coweta County Sergeant Mark Fenninger ("Fenninger") appeal from the denial of summary judgment on their claims of qualified immunity on Victor Harris' ("Harris") 42 U.S.C. § 1983 action based on Harris' allegations that Scott violated his Fourth Amendment rights by using excessive force during a high-speed car chase, and that Fenninger violated his Fourth Amendment rights by authorizing that use of force.

I. BACKGROUND

Viewed in the light most favorable to the non-movant, Harris, the facts pertaining to the chase that covered approximately nine miles and lasted approximately six minutes are as follows. Between 10:30 and 11:00 pm on March 29, 2001, a Coweta County deputy clocked Harris' vehicle at 73 miles per hour in a 55 mile-per-hour zone. The vehicle that Harris was driving was registered in Harris' name and at his proper address. Although the deputy flashed his blue lights, Harris continued driving. The deputy pursued, and in attempting to flee, Harris drove in excess of the speed limit, at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes, and ran through two red lights. Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements.

After Harris refused to stop, the deputy radioed dispatch and reported that he was pursuing a fleeing vehicle, and broadcast its license plate number. He did not relay that the underlying charge was speeding. Scott heard the radio communication and joined the pursuit, as it proceeded toward the county line into Fayette County, Georgia.

After crossing into Peachtree City in Fayette County, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex, where two Peachtree City police vehicles were already stationed. Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74, driving his vehicle directly into Harris' path. Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came into contact with each other, causing minor damage to Scott's cruiser.[1] Harris then entered Highway 74 and continued to flee southward at a high speed.

Through Peachtree City, Scott took over as the lead vehicle in the chase. After getting on Highway 74, Scott radioed a general request for "Permission to PIT him." A "PIT" ("Precision Intervention Technique") maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a *specific* point on the vehicle, which throws the car into a spin and brings it to a stop.[2] Harris' expert's report attests that "national law

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[1] Scott disputes this version of events. For purposes of summary judgment, we accept Harris' version.

[2] At the time of the chase, the Coweta County Sheriff's Department had a vehicle pursuit policy, which stated that "[d]eliberate physical contact between vehicles at anytime may be justified to

(Continued on following page)

enforcement standards require than [sic] an officer be trained in all deadly force applications before being permitted to use those applications." R. 24, at 9-10. Scott had not been trained in executing this maneuver. He and the other Coweta officers did not undergo a training on PITs until *after* the incident.

Fenninger was the supervisor who responded to Scott's radio call and granted Scott permission to employ the PIT, telling him to: "Go ahead and take him out. Take him out." Fenninger – who tuned into the transmissions about the pursuit late – did not know how the pursuit originated, the speeds of the vehicles, the numbers of motorists or pedestrians on the roadways, or how dangerously Harris was driving. Fenninger also did not request further details about the pursuit prior to authorizing the PIT.

After receiving approval, Scott determined that he could not perform the PIT maneuver because he was going too fast. Instead, however, he rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash. As a result, Harris was rendered a quadriplegic.

II. STANDARD OF REVIEW

We review the denial of summary judgment *de novo*. *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003). In conducting our review, we apply the same legal standards as the district court. *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003). Thus, we view the facts in the light most

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terminate the pursuit upon the approval of the supervisor." R. 48, Ex. 11, at 93.

favorable to the non-moving party, and draw all reasonable inferences in his favor. *Id.* Summary judgment is not appropriate unless the evidence demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A defendant's entitlement to qualified immunity is a question of law, also to be reviewed *de novo*. *Cagle*, 334 F.3d at 985.

III. DISCUSSION[3]

As we have often stated, "[q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (internal citations and quotation marks omitted). This immunity "allow[s] government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation[.]" *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Thus, in order to receive its protections, the government official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). In this case, there is no dispute that

[3] We reject Harris' first argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision.

when Scott rammed Harris' vehicle during the high-speed pursuit on March 29, 2001, he did so as part of his discretionary functions as deputy of the Coweta County Sheriff's Department (CCSD). It is likewise clear (and uncontested) that Fenninger's authorization of Scott's use of a PIT maneuver was a decision made in his capacity as supervisor to Scott and sergeant of the CCSD.

The defendants having established their eligibility for qualified immunity, the burden then shifts to the plaintiff to show that qualified immunity is not appropriate. *Lee*, 284 F.3d at 1194. This next step consists of a two-part inquiry, set forth in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). First we ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* If, assuming the plaintiff's allegations were true, no such right would have been violated, the analysis is complete. However, if a constitutional violation can be made out on the plaintiff's facts, we then must determine "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal law." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278-79 (11th Cir. 2004) (citing *Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151). We address these questions in turn.

A. *Did Scott and Fenninger Violate Harris' Constitutional Right To Be Free From An Unreasonable Seizure?*

Harris alleges that Scott violated his Fourth Amendment right to be "free from the use of excessive force in the course of an investigatory stop or other 'seizure' of the

person." *Kesinger*, 381 F.3d at 1248 (citing *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). To establish an excessive force claim, Harris must show first that he was subjected to a "seizure" within the meaning of the Fourth Amendment. *Vaughan*, 343 F.3d at 1328.

The district court concluded, and Scott does not contest, that Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash. Pursuant to *Brower v. County of Inyo*, 489 U.S. 593, 596-99, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), using a vehicle to stop and apprehend a suspect is a seizure. In *Brower*, the Supreme Court held that a fleeing suspect who fatally crashed into a so-called "deadman" roadblock[4] during a high-speed chase had been "seized" by the police who set up the roadblock.[5] The Court defined a seizure as "a

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[4] A deadman or "blind" roadblock is an obstacle (usually a police car or truck) placed on the road in a manner that prevents an oncoming driver who is being pursued by the police from knowing the road is blocked.

[5] This court held in *Adams v. St. Lucie County Sheriff's Dept.*, 998 F.2d 923, 923 (11th Cir. 1993) (*en banc*) that as of 1985 it was not "clearly established" that striking a car during a police chase constituted a seizure. That case was decided before *Saucier* and did not decide the first question which must be answered in a qualified immunity case pursuant to *Saucier*: whether a constitutional right had been violated. *See Adams*, 962 F.2d at 1577-78 ("To resolve the question of qualified immunity, we need not decide today whether the Fourth Amendment was violated."). In addition, the question in *Adams* – whether the striking of a car during a police chase constituted a seizure – has been unequivocally answered in the affirmative by the Supreme Court in *Brower*. *See Brower*, 109 S.Ct. at 1381. Moreover, the fact that striking the car during the police chase constituted a seizure is not in dispute in this case, as the officer who rammed Harris does not, and could not under the circumstances of this case, contest that he seized Harris.

governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 597, 109 S.Ct. 1378 (emphasis omitted). The Court reasoned that "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result . . . Brower was meant to be stopped by the physical obstacle of the roadblock – and . . . was so stopped." *Id.* at 599, 109 S.Ct. 1378. The Court noted that if "the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure." *Id.* at 597, 109 S.Ct. 1378. *See also Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003) ("As we have held, a Fourth Amendment seizure occurs as a result of a car collision only where the police officer intended the collision to be the result."); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949 (7th Cir. 1994) (finding a Fourth Amendment "seizure" where officer intentionally backed up squad car into the path of a fleeing motorcycle and provoked collision, sending both driver and passenger airborne).

Having determined that Harris was seized, we turn to the question of whether the force used by Scott to effectuate the seizure was reasonable, in light of the facts according to Harris.[6] In *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court made

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[6] In applying the test, we must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The reasonableness inquiry is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397, 109 S.Ct. 1865.

clear that the reasonableness of a seizure "depends on not only when a seizure is made, but also how it is carried out." In *Garner*, as in this case, the Court considered a suit for damages under 42 U.S.C. § 1983 on the grounds that the manner of the seizure violated Garner's constitutional rights. The police argued that because Garner was a fleeing felon, *any* force necessary to capture him was permissible. The Supreme Court held that the use of deadly force may not be used to seize a fleeing felon "unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3, 105 S.Ct. 1694 (emphasis supplied). The Court concluded that:

> [t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11, 105 S.Ct. 1694.

The Court recognized that limited circumstances might justify the use of deadly force, to wit: (1) "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer

with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm," *and* (2) if deadly force is "necessary to prevent escape," *and*, (3) "if, where feasible, some warning has been given." *Id.* 471 U.S. at 11-12, 105 S.Ct. 1694. *See also Vaughan*, 343 F.3d at 1329-30. Without meeting all of these conditions, the use of deadly force is constitutionally unreasonable.

"Deadly force" is force that creates "a substantial risk of causing death or serious bodily injury." *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n. 10 (11th Cir. 1985) (citing Model Penal Code (MPC) § 3.11(2) (1962)).[7] The Coweta County Sheriff Department's Use of Force Policy provides an analogous definition – "[f]orce which, under the circumstances in which it is used, is readily capable of causing death or other serious injury." R. 48 at Ex. 12, at 82. In *Pruitt*, we found that shooting a suspect in the legs to stop him was a "use of deadly force" in the constitutional sense, even though the officer did not necessarily shoot to kill. We reasoned that the MPC and Alabama Code definitions of deadly force "clearly encompass[ed]" the force used in that case because "[the officer], at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury." 771 F.2d at 1479 n. 10.

Like other instrumentalities, the use of an automobile cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately

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[7] In *Pruitt* we also looked to the Alabama Code, which defined "deadly force" as "[f]orce which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury." 771 F.2d at 1479 n. 10.

to cause death or serious bodily injury. *See Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (suspect "used the automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which [suspect] was armed"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon.' . . . An automobile has been held to constitute a deadly weapon when used to run down a law enforcement officer. Likewise, in this instance appellants' boat, used in an attempt to ram the vessel of Customs officials, also could properly be considered a deadly weapon.") (internal citations omitted). *See also Hernandez*, 340 F.3d at 624 (officer had probable cause to shoot suspect where suspect "posed an imminent threat of serious physical harm to himself and to others as evidenced by [suspect's] driving head-on into [the officer's] vehicle"); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (citing *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990)) ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon."). *Cf. Browér v. County of Inyo*, 884 F.2d 1316, 1317-18 (9th Cir. 1989) (assuming without deciding that deadman roadblock to stop a fleeing vehicle during a high-speed chase was an application of "deadly force" and applying *Garner* analysis).

Under an objective view of the facts of this case, there is little dispute that the ramming of Harris' car could constitute a use of "deadly force" and that a jury could so reasonably conclude.[8] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("The judge's inquiry [at the summary judgment stage], therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."). Moreover, none of the limited circumstances identified in *Garner* that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694. Indeed, neither Scott nor Fenninger had any idea why Harris was being pursued. The use of

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[8] *See also* Scott's Depo., R. 48 at 157-58 (testifying that ramming Harris' vehicle at high speeds constituted a use of deadly force under the CCSD Deadly Force Policy); Fenninger's Depo., R. 50 at 62-63 (testifying that he gave authorization to make contact with the understanding that he was authorizing the use of deadly force). *See also* testimony of other Coweta County and Peachtree City officers stating that they considered that ramming a vehicle at 90 mph could constitute a use of "deadly force." Reynold's Depo., R.49 at 118-119; Yeager's Depo., R. 54 at 59; Kinsey's Depo., R. 51 at 44; Ercole's Depo., R. 47 at 37-40.

deadly force is not "reasonable" in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest. *Vaughan*, 343 F.3d at 1330. The *Garner* Court specifically recognized that it would be an anomaly to transform "every fleeing misdemeanant into a fleeing felon . . . solely by virtue of his flight." 471 U.S. at 10 n. 9, 105 S.Ct. 1694.[9] A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the "substantial threat" of imminent physical harm that *Garner* requires before deadly force can be used. *Garner* made clear that "[i]t is not better that all . . . suspects die than that they escape." 471 U.S. at 11, 105 S.Ct. 1694.[10]

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[9] As recognized in *Vaughan*:

> Under *Garner*, a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect only when the suspect poses an immediate threat of serious harm to police officers or others. In this case, the danger presented by [the suspects'] continued flight was the risk of an accident during the pursuit. Applying *Garner* in a common-sense way, a reasonable officer would have known that [ramming a car when both automobiles were] traveling at approximately 80 miles per hour . . . would transform the risk of an accident on the highway into a virtual certainty.

343 F.3d at 1332-33.

[10] We recognize that whether or not Harris would have escaped has no bearing on the excessive force analysis, as *Garner* specifically based its holding on the assumption that a fleeing suspect *would* escape. 471 U.S. at 11, 105 S.Ct. 1694. We note, however, as did the district court, that there were other means to track Harris down as the pursuing officers had a description of the vehicle as well as the license plate number. We also note that absolutely no warning was given that Scott intended to use deadly force.

We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. *Cf. Pace*, 283 F.3d at 1282 (officer had probable cause to believe that car had become a deadly weapon with which defendant was armed where suspect drove through residential neighborhood at 50 to 60 mph, swerved at oncoming police cars, nearly hit elderly motorist head-on when driving on wrong side of road, and accelerated towards police car roadblock forcing officer off of the road to avoid collision); *Cole v. Bone*, 993 F.2d 1328, 1331-34 (8th Cir. 1993) (deadly force was reasonable to stop high-speed chase where truck forced more than one hundred cars off the road or out of the truck's way and endangered the lives of many other motorists during the pursuit, chase lasted 50 miles, and officers attempted to slow the vehicle using several types of roadblocks). Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[11]

[11] Nor does the evidence show that Scott or the other officers were in immediate danger or threatened with imminent harm. Accepting

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Nor can we countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase. The Supreme Court rejected such an argument in *Brower*, where it was suggested that the plaintiff in that case "had a number of opportunities to stop his automobile prior to the impact" and thus, could have avoided his own injuries. *Brower*, 109 S.Ct. at 1380-81 (citation omitted). Justice Scalia noted that essentially the same thing could have been said about the suspect in *Garner*, that is, the plaintiff's "independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." *Id.* at 1381.

We conclude that ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated Harris' Fourth Amendment rights.

Harris' version of events, Harris did not attempt to ram, run over, sideswipe, or swerve into any of the officers (which might have put their lives in danger in the parking lot), nor did he attempt any such conduct once he was back on the highway immediately before the seizure. *Cf. Hernandez*, 340 F.3d at 623 (evidence of plaintiff's attempts to intentionally drive his car directly into officer's vehicle supported finding that officer's use of deadly force was reasonable); *Smith*, 954 F.2d at 347 (use of deadly force not unreasonable where suspect "posed a major threat" to officers manning roadblock by driving directly into them on a residential dead-end street and "had proven he would do almost anything to avoid capture").

With respect to Fenninger, however, we cannot come to the same conclusion. Although the use of deadly force cannot be authorized under *Garner* without knowing that the *Garner* conditions have been met, the facts of this case do not establish that Fenninger authorized deadly force. Rather, the evidence shows that Fenninger authorized a PIT – defined by the district court as "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight "safely." *See, e.g.*, Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speeds on wide straightaways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT "is not applicable in every situation, the key to its effective use is to carefully choose a favorable spot before attempting PIT and to first consider the possible effects on other traffic and pedestrians"); National San Diego Police Department Use of Force Task Force Recommendations, Executive Summary at 37 ("Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible."). Scott, however, chose not to execute a PIT at all, but rather to ram the car at a very high speed from behind. Because this ramming was not authorized by Fenninger, we cannot say that Fenninger's conduct-authorization of a safe PIT that was not executed – violated Harris' constitutional rights. Thus, since Fenninger is not liable for a constitutional

violation, summary judgment should be granted in his favor. The district court's ruling as to Fenninger is therefore reversed.

B. Is Scott entitled to qualified immunity?

Having determined that a jury could have reasonably found the violation of a constitutional right by Scott, we now ask whether the law as it existed on March 29, 2001, was sufficiently clear to give reasonable law enforcement officers "fair notice" that ramming a vehicle under these circumstances was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "The essence of qualified immunity is notice." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)).

For at least twenty years, since *Garner* was decided, officers have been on notice that they may not use *deadly force* to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury. *See Garner*, 471 U.S. at 11-12; *see also Garner*, 471 U.S. at 10-11 ("[t]he fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). Moreover, prior to the incident in question the law was clearly established that an automobile, like a gun, could be used as a deadly instrument. *See also Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (concluding that fleeing felon in 1998 had used car in a way that made it a "deadly weapon"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is

likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon' concluding that appellants' boat, used in an attempt to ram the vessel of Customs officials, [could] . . . properly be considered a deadly weapon.") (internal citations omitted).[12]

It was also clearly established at the time of the instant circumstances that the Fourth Amendment requires a seizure of a fleeing suspect to be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force. *Garner*, 471 U.S. at 8, 11-12 (holding that "[t]he use of deadly force to prevent the escape of all *felony* suspects, whatever the circumstances, is constitutionally unreasonable. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"; "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out") (emphasis added); *Brower v. County of Inyo*, 109 S.Ct. 1378, 1381 (1989). *See Terry v. Ohio*, 392 U.S. 1, 19-20 (1968) (requiring reasonableness of seizure based on the circumstances, including scope and intensity of seizure); *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (same); *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997) (holding Fourth Amendment violated if seizure occurred and force used to effect the seizure was unreasonable); *see generally Mercado v. City of Orlando*, 407

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[12] *See also Hawkins v. City of Farmington*, 189 F.3d 695, 703 (8th Cir. 1999); *Ludwig*, 54 F.3d at 473 (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Sturges v. Matthews*, 53 F.3d 659, 661 n. 1 (4th Cir. 1995); *Smith*, 954 F.2d at 347 (citing *Sanchez*, 914 F.2d 1355) ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon.").

F.3d 1152, 1160 (11th Cir. 2005) (holding that in 2002 there was a "clearly established principle that deadly force cannot be used in non-deadly situations.").[13]

Impacting our review of reasonableness is a "careful attention to the facts and circumstances of each particular case, *including the severity of the crime at issue.*" *Graham*, 490 U.S. at 396 (emphasis added); *Lee v. Ferraro*, 284 F.3d 1188, 1197-98 (11th Cir. 2002) (denying qualified immunity to officer on excessive force claim partially because of low level of plaintiff's offense; "*Graham* dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime. . . . "); *Jackson v. Sauls*, 206 F.3d 1156, 1170 n. 18 (11th Cir. 2000) ("A court may also factor in 'the severity of the crime. . . . '") (quoting *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) (same); *see generally United States v. Kaplan*, 286 F. 963, 974 (D.C. Ga. 1923) (holding that "in the case of a misdemeanor, the general rule that an officer has no right, except in self-defense, to kill the offender to effect his arrest, and that the 'killing of a fleeing person under such circumstances would amount to murder.'"); *King v. State*, 91 Ga. App. 825, 828 (Ga. App. 1955) ("no arresting officer has any

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[13] To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Graham*, 490 U.S. at 8 (citing *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)).

right to kill a person for trying to escape in the commission of a misdemeanor").

Thus, by 2001 the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the *Garner* preconditions.

The establishment of these principles distinguishes this case from *Brosseau v. Haugen*. In *Brosseau*, the Supreme Court reversed the denial of qualified immunity to an officer sued for Fourth Amendment violations under § 1983 for shooting a suspected felon as he attempted to flee in a vehicle, where the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area.[14] Unlike Harris, Haugen,

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[14] These facts are not comparable to those in *Harris*. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an *immediate* risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. Unlike the situation in *Brosseau*, the parties were not in close physical proximity nor had they had a one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from *behind in their squad cars*. At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a *residential* neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade

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the suspect in *Brosseau*, was a suspected felon with a no-bail warrant out for his arrest, with whom Brosseau, the officer, had a violent physical encounter prior to the shooting. Believing that Haugen had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep, and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity – the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere nearby), a woman and her 3-year-old child in a small vehicle parked directly in front of the Jeep and 4 feet away, and two men in a parked vehicle 20 to 30 feet away. In addition, prior to shooting, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit Haugen in an attempt to get the keys.

Looking to *Garner*, the *Brosseau* Court recognized that its clearly established deadly force rule (i.e., that "it is unreasonable for an officer to 'seize an unarmed non dangerous suspect by shooting him dead' ") was limited by the Court's further instruction that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau*, 125 S.Ct. at 598 (quoting *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. Thus, the *Brosseau* Court held that *Garner* did not provide a reasonable

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of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.

officer with fair notice of a Fourth Amendment violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, *when persons in the immediate area are at risk from that flight.*" *Id.* at 600 (emphasis supplied).[15]

Scott also argues that *Garner* does not apply because in that case, the officer applied the deadly force with a gun. Scott relies on our holding in *Adams* that in 1985, the caselaw was insufficiently developed to give notice to every objectively reasonable officer that a police car ramming another car during a high-speed pursuit would constitute

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[15] We also note that the Court in *Brosseau* acknowledged that the standard in *Garner can* "clearly establish" whether or not the use of deadly force is unconstitutional in an "obvious case." *Brower,* 489 U.S. at 599; *United States v. Lanier,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("general constitutional rule already identified in the decisional law . . . appl[ied] with obvious clarity to [his conduct]."). It is well-established that "general statements of the law" are perfectly capable of giving clear and fair warning to officers even where " 'the very action in question has [not] previously been held unlawful.' " *Lanier,* 520 U.S. at 271 (quoting *Anderson,* 483 U.S. at 640, 107 S.Ct. 3034); *Vinyard,* 311 F.3d at 1350-51. While we need not conclude that the facts in *Harris* present just such an "obvious" case to deny Scott qualified immunity, this case may present such circumstances, since the evidence shows that Scott lacked the sufficient probable cause to warrant the use of deadly force. In this way, *Harris* is more like *Vaughan* than *Brosseau* or the cases cited therein. *See Vaughan,* 343 F.3d at 1333 ("appl[ying] *Garner* in a common-sense way" to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit *where the suspect posed no immediate threat of harm to police officers or others*). In the cases relied upon in *Brosseau,* the officer had arguable probable cause to believe that the suspects presented an immediate risk of danger to the officers or others. *See Brosseau,* 125 S.Ct. at 600 (citing *Cole v. Bone,* 993 F.2d 1328 (8th Cir. 1993) and *Smith,* 954 F.2d 343). Without the existence of an immediate threat of harm to the officers or others that could justify the officer's probable cause, the *Garner* rule prohibiting deadly force may apply with "obvious clarity."

an unreasonable seizure. However, the facts in *Adams* occurred before *Brower* was decided, and thus, at a time before the Supreme Court made clear that the intentional use of a vehicle to apprehend a suspect was a Fourth Amendment seizure. That principle is now settled. *Garner* made clear that the use of deadly force against an unarmed and nondangerous fleeing felony suspect was unlawful and set out the specific criteria necessary before the application of deadly force is warranted. This law clearly applied to the use of a vehicle to seize a suspect at the time of the incident in this case.

We are satisfied that, under *Hope*, the requirement that the officers have "fair warning" that their conduct violates a constitutional right through a general constitutional rule, "even though the very action in question has [not] previously been held unlawful," has been satisfied. 536 U.S. at 740-41, 122 S.Ct. 2508 (internal quotation marks and citations omitted). A reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force,[16] could be used to effectuate a seizure,[17] and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set out in *Garner* existed. *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694. *See also Vaughan*, 343 F.3d at 1329-30. The *Garner* Court used the term "deadly force," not "handgun," in enunciating its rule. *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694 ("Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious

[16] *See* citations on pages, *supra*.

[17] *Brower*, 489 U.S. at 596-99, 109 S.Ct. 1378.

physical harm, *deadly force* may be used . . . ") (emphasis supplied). Moreover, the opinion recognizes the obvious principle that "deadly force" can be inflicted through other means. *Id.* at 14, 105 S.Ct. 1694 (observing that in times when weapons were rudimentary, "[d]eadly force could be inflicted almost solely in a hand-to-hand struggle . . . "). *See Vaughan*, 343 F.3d at 1332 ("the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration"). *See also Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (applying *Garner* "deadly force" rule to determine whether officers were qualifiedly immune for hog-tying suspect).

By 2001, it was well-established in this circuit that "deadly force" means force that creates a substantial risk of causing death or serious bodily injury. *Pruitt*, 771 F.2d at 1479 n. 10. The CCSD policy in 2001 employed a near-identical definition. Moreover, by 1986, we had recognized the potentially lethal nature of an automobile. *See Gualdado*, 794 F.2d at 1535, and other cases cited on pages ___, *supra*.

We are also satisfied that common sense would inform any reasonable officer that there would be substantial risks of death or bodily harm if he used his vehicle to ram another vehicle at high speeds in the manner employed in this case. *See* CCSD Use of Force Policy, R. 48, Ex. 12 at 82 (restricting the use of deadly force to "[w]hen the Deputy reasonably believes it is necessary to defend their [sic] own life or the life of another or to prevent grave bodily injury to themselves [sic] or another, and all other available means of defense have failed or would be inadequate or dangerous," or "[w]hen necessary to prevent the commission of . . . any felony which involves the use or threat of

physical force or violence against any person."). *See also* Ga.Code Ann., § 17-4-20(b) ("Sheriffs and peace officers . . . may use deadly force to apprehend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm."); *Garner*, 471 U.S. at 10-11, 105 S.Ct. 1694 ("The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). *Cf.* CCSD Pursuit Policy, R. 48, Ex. 11, at 94 (categorizing roadway barricades as the use of deadly force and limiting their use "only by order of a supervisor and then only as a last resort when the person pursued has proven by his method of flight a total disregard for the lives and safety of the public"). *See Vaughan*, 343 F.3d at 1332-33 ("Applying *Garner* in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to . . . qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment.").

For the foregoing reasons, a jury could conclude that Scott unreasonably used deadly force to [illegible] Harris by ramming him off the road under the instant circumstances,

and we find no reversible error in the denial of qualified immunity to Scott at this stage in this case.[18]

Consistent with the above conclusions, the district court opinion is

REVERSED IN PART and AFFIRMED IN PART.

[18] Scott is not foreclosed from seeking to assert a qualified immunity defense at trial if the facts proven at trial differ from those we consider here for summary judgment purposes.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15094-HH

VICTOR HARRIS,

Plaintiff-Appellee,

versus

MARK FENNINGER,
Sgt.,
TIMOTHY C. SCOTT,
Deputy,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Feb. 17, 2006)

Before: BIRCH, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

743B (5)

No. 05-1631

Supreme Court, U.S.
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DEC 13 2006
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In The
Supreme Court of the United States

TIMOTHY SCOTT,
a Coweta County, Georgia, Deputy,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775

PHILIP W. SAVRIN
Counsel of Record
SUN S. CHOY
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Is it "objectively reasonable" under the Fourth Amendment for a police officer to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper when the suspect has demonstrated that he will continue to drive in a reckless and dangerous manner that puts innocent lives at risk?

2. Whether, at the time of the incident, it was "clearly established" that an officer's terminating a dangerous high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper violated the suspect's Fourth Amendment rights?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005). (J.A. at 65.) The opinion of the United States District Court for the Northern District of Georgia is unreported and reproduced in the Joint Appendix. (J.A. at 38.)

JURISDICTION

The Eleventh Circuit entered judgment on December 23, 2005. (J.A. at 65.) Petitioner filed a timely petition for rehearing en banc on January 11, 2006. The Eleventh Circuit entered an order denying the petition on February 17, 2006. (J.A. at 91.) Petitioner filed a petition for writ of certiorari on May 18, 2006, and the Court granted the petition on October 27, 2006. *Scott v. Harris*, 127 S. Ct. 468 (2006). The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent seeks damages pursuant to 42 U.S.C. § 1983 for an alleged violation of his rights under the Fourth Amendment to the United States Constitution. The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case involves a police officer's effort to end a dangerous high-speed car chase. The pursuit lasted about six minutes and covered between eight and nine miles, for an average speed of between 80 and 90 miles per hour. (R. 36, Ex. A, 78-22:48:08; R. 36, Ex. A, 66-22:48:47; J.A. at 30.)[1]

[1] The pursuit was videotaped by cameras located in the officers' cruisers. Record 36, Exhibit A consists of the video recordings from the vehicles of Deputy Timothy Scott and Deputy Clinton Reynolds. The videotapes are denoted by vehicle number – No. 66 for Scott and No. 78 for Reynolds – and time as reflected on the video counter. According to the videotape on Reynolds's cruiser, Scott's vehicle made contact with Harris's vehicle six minutes and eight seconds after Reynolds had initially switched on his siren to signal that Harris should pull over. (R. 36, Ex. A, 78-22:48:08; R. 36, Ex. A, 66-22:48:47.) As Harris admits, the pursuit covered between eight and nine miles. (J.A. at 30.) Based on

(Continued on following page)

On the evening of March 29, 2001, Coweta County Deputy Sheriff Clinton Reynolds observed respondent Victor Harris traveling at 73 miles per hour in a 55 miles-per-hour zone. Reynolds attempted to pull over Harris by flashing his lights and then turning on his siren. Instead of stopping, Harris began to speed away. He passed motorists by crossing over double yellow traffic control lines and raced through a red traffic light. (R. 36, Ex. A, 78-22:48, 78-22:44:36; R. 49 at 50; R. 36, Ex. 6.) Reynolds radioed dispatch and reported that he was following a fleeing vehicle.

At the time of Reynolds's call, petitioner Timothy Scott, another Coweta County Deputy Sheriff, was parked by a church about a mile away. Along with Reynolds, his assignment was to assist undercover officers who were making a controlled buy of illegal drugs. When Scott heard Reynolds's report, he assumed the pursuit was in connection with the undercover operation. (R. 48 at 114-17.) Scott became one of several police officers who joined the chase to assist Reynolds. After Scott joined the pursuit, he estimated the speeds to be in excess of 100 miles per hour on a narrow two-lane road. (R. 36, Ex. A, 78-22:42:48, 22:44:09; R. 49 at 50; R. 36, Ex. 6.) Harris cannot dispute these speeds. (R. 38 at 38, 100, 120.)

With Scott and other law enforcement officers hot on his trail, Harris veered into a drug store parking lot that was part of a shopping complex. The shopping complex was apparently closed for the night at the time. Scott was unable to stop his vehicle in time to follow Harris into the parking lot, but he entered the exit to the complex and

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this distance and the time recorded, Harris's speed averaged 80 to 90 miles per hour.

attempted to block Harris from escaping. Unfortunately, Scott's effort to stop Harris in the parking lot proved unsuccessful. As the videotape of the chase demonstrates, Harris was undeterred by Scott's vehicle blocking the exit; Harris collided with Scott's car and then sped off back onto another road, Highway 74, where he once again raced down a two-lane road at high speeds, crossing double yellow control lines and running a red light.

Police officers from the neighboring jurisdiction of Peachtree City had observed the pursuit and decided on their own initiative to block off a few intersections on the road. However, Scott testified that he was not familiar with the area, knew that not all cars had been stopped, and did not know where the intersections were located. (R. 48 at 188.) It was at that point that he requested approval from his supervisor to stop Harris's vehicle by force.

To do so, Scott intended to employ a Precision Intervention Technique ("PIT") maneuver, which causes the fleeing vehicle to spin to a stop. Although permission was granted, he became concerned that the vehicles were moving too quickly to safely execute the maneuver. Instead he picked a moment when no motorists or pedestrians appeared to be in the immediate area, and made contact with Harris's vehicle by using his push bumper. As Scott explained,

> [A]s I made the attempt to start this [PIT], I realized I wasn't going to be able to do it, but there was either a – a red light or a vehicle ahead of us and I needed to get that car stopped now while there was nobody around, so I decided to make direct contact with his vehicle with my push bumper.

(R. 48 at 147.) As Scott further testified, his intent was to stop the pursuit, "not for the vehicle to wreck." (R. 48 at 150.) Moments later, Harris lost control of his car and swerved off the side of the road and rolled down an embankment before coming to a complete stop. Harris was not wearing a seatbelt, and he was severely injured when his car rolled down the embankment.

Harris filed suit under 42 U.S.C. § 1983 alleging violations of his federal constitutional rights as well as Georgia law. All claims have been dismissed on motion, except for a Fourth Amendment claim against Scott in his individual capacity.[2] On interlocutory appeal, the Eleventh Circuit applied the excessive force standard of *Tennessee v. Garner*, 471 U.S. 1 (1985), a case involving an officer who shot and killed an unarmed suspect who was attempting to escape on foot. *Harris*, 433 F.3d at 813.[3] In an opinion authored by Judge Barkett, the Eleventh Circuit ruled that the *Garner* test applied because Scott's contact with Harris's vehicle constituted "deadly force." *Id.* at 814. Under the *Garner* test, the Eleventh Circuit ruled, Scott's use of deadly force was impermissible because "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others." *Id.* at 815. "The use of deadly

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[2] All claims against Coweta County and all remaining state law claims were dismissed by the district court upon reconsideration following the Eleventh Circuit's interlocutory ruling.

[3] The panel filed an initial opinion that appeared at *Harris v. Coweta County*, 406 F.3d 1307 (11th Cir. 2005). On rehearing, the panel substituted a second opinion published at *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005).

force is not 'reasonable' in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest." *Id.*

The Eleventh Circuit denied qualified immunity to Scott as well. According to the Eleventh Circuit, the *Garner* framework made it clearly established as of 2001 that contact with Harris's vehicle violated his Fourth Amendment rights. *Id.* at 817-21. By 2001, the Eleventh Circuit wrote, "the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the *Garner* preconditions." *Id.* at 818-19. Thus, the Eleventh Circuit concluded, Scott should have known in light of these principles that his contact was unconstitutional. *Id.* This Court granted certiorari to review both the constitutionality of Scott's use of force and his claim of qualified immunity. *Scott v. Harris*, 127 S. Ct. 468 (2006).

SUMMARY OF THE ARGUMENT

Scott's contact with Harris's vehicle was objectively reasonable because, under the facts and circumstances presented, he reasonably believed that his actions avoided a greater risk of serious injury or death. Reasonableness under the Fourth Amendment requires a balancing of interests. The Court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests

at stake. Reasonableness must be judged from the perspective of the officer on the scene, rather than with the 20/20 vision of hindsight. When an officer attempts to end a dangerous high-speed automobile chase, reasonableness requires a direct balancing of the risks of acting and the risks of failing to act. A fleeing car can be a deadly weapon, and an officer who acts reasonably to minimize the dangers of death or injury satisfies the Fourth Amendment.

Scott properly recognized that Harris was a continuing danger to the public, and he acted reasonably to defuse the danger. Scott personally observed Harris driving recklessly and dangerously at extremely high speeds, through red lights, and on the wrong side of the road. Scott had unsuccessfully tried to stop Harris in the parking lot just moments earlier; instead of stopping, Harris collided with Scott's car, managed to sneak by it, and then raced out of the parking lot and back on to a highway where the high-speed chase continued. In light of Harris's driving, Scott acted reasonably in attempting to stop Harris's car. Scott asked for and obtained permission to stop Harris's vehicle. He picked a flat part of the road where no other cars were present and approached Harris's car with caution. The difference between the speed of the two cars at the moment of contact was slight. Given the options that Scott faced, his attempt to stop Harris's fleeing vehicle by using his push bumper was an objectively reasonable choice designed to protect the public.

Finally, if this Court holds that Scott's conduct violated the Fourth Amendment, Scott is nonetheless entitled to qualified immunity. A reasonable officer in Scott's position could have and would have believed that his conduct was lawful in light of clearly established law and

the information the seizing officer possessed. This Court's precedents on excessive force are cast at a high level of generality, and how they apply to many specific cases remains uncertain. Further, the lower court precedents relating to vehicle contacts are both sparse and uncertain. The most relevant cases on the books at the time suggested that Scott's conduct was legal. As a result, Scott is entitled to qualified immunity.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO TERMINATE A HIGH-SPEED PURSUIT IF THE OFFICER REASONABLY BELIEVES THAT DOING SO WOULD AVOID A GREATER RISK OF BODILY INJURY OR DEATH

The Fourth Amendment prohibits unreasonable searches and seizures. Viewing the facts most favorably to Harris, as required in the summary judgment context, Harris was "seized" for purposes of the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989). The key question is whether the seizure was constitutionally reasonable. *Graham v. Connor*, 490 U.S. 386 (1989), sets out the basic principles governing whether a use of force is reasonable:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has

> long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396 (citations and internal quotation marks omitted). The Court continued,

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and

> circumstances confronting them, without regard to their underlying intent or motivation.

Id. at 396-97 (citations and internal quotation marks omitted).

In the context of efforts to end high-speed pursuits using vehicle-to-vehicle contact, objective reasonableness must be evaluated with a rule that mirrors and reinforces the basic balancing test demanded by the Fourth Amendment. An officer's effort to stop a fleeing car is constitutionally permissible when the officer reasonably believes that his actions are needed to avoid a greater risk of bodily injury or death. Reasonableness requires a balancing of interests, and in the case of high-speed police pursuits, the two sides of the constitutional balance involve risks of harm to a person's safety. Letting the chase continue creates certain risks, as does trying to bring the chase to an end. As a result, an officer's effort to stop a fleeing car is clearly reasonable to avoid a greater risk of bodily injury or death. In that context, the public interest in trying to defuse an extremely dangerous situation caused by the suspect's reckless driving outweighs the "nature and quality of the intrusion on the individual's Fourth Amendment interests." *United States v. Place*, 462 U.S. 696, 703 (1983).

The balance of interests in a police pursuit begins with the recognition that an automobile is "a dangerous instrumentality." *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930). When a driver decides to put himself and others at risk by "taking his chances" of outrunning the police, he creates a series of tragic but predictable risks of harm to himself, innocent bystanders, and the police. A car

driven recklessly at excessive speeds is analogous to a bullet, and no one – not even the driver – knows what it might strike. Perhaps the fleeing car will hit a bystander, such as another driver or a pedestrian. Perhaps it will hit an officer, injuring or killing him. Having decided to take his chances that he can outrun the police, the driver recklessly endangers the lives of himself and the public. When an officer acts reasonably to minimize the risk, the balance of interests plainly tips in the direction of reasonableness. *Cf.* MODEL PENAL CODE § 3.02(1)(a) (Proposed Official Draft 1962) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented. . . . ").

It is true that the police generally have the option of calling off the pursuit, which in some circumstances may lessen the risk. But that does not render all uses of force constitutionally unreasonable in this context; calling off the pursuit does not eliminate the risk to the public, as the driver will continue to drive recklessly for a period of time after the officer withdraws. During that time frame, anything is possible. The driver may not even notice or acknowledge that the risk of capture has ended. Having decided in the heat of the moment to take his chances and try to outrun the police, the driver is unlikely to be thinking rationally. Even if the police cars no longer appear in the rear view mirror, the driver cannot know if the risk of capture has ended. Perhaps the police cars have just taken a different path, and will cut him off at the next intersection or exit. Perhaps the police have called ahead to set up

a road block. Piloting his car at perilously high speed, the fleeing driver remains a serious threat to the public.

Further, the government's interest in stopping the suspect includes furthering important law enforcement interests that are not served if the fleeing driver is permitted to escape. A driver's decision to take his chances and try to escape from the police typically triggers considerable criminal liability. The fleeing driver has not only committed the offense that led the police to engage him initially, but likely has committed a series of other dangerous offenses that may include reckless driving, aggravated assault, endangerment, obstruction, and eluding a peace officer.

Finally, the decision to flee suggests a possibility of other serious criminal activity. Law-abiding drivers normally behave more cautiously when a police officer makes his presence known. Many drivers instinctively slow down. Speeding away naturally arouses a reasonable officer's suspicion; while "not necessarily indicative of wrongdoing, . . . [flight] is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). For these reasons, the possibility of ending the chase by letting the suspect escape does not make vehicle contact constitutionally unreasonable. The key question is whether the officer reasonably believes that the vehicle contact is needed to avoid a greater harm of bodily injury or death.

The Eleventh Circuit analyzed the reasonableness of the seizure in this case using the framework announced by this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, a police officer shot and killed a boy who was fleeing on foot after stealing a purse. The officer realized

that the suspect was not armed, and the officer was not in fear of anyone's safety. Nevertheless, when the suspect began to climb a chain-link fence, the officer shot him in the back of his head, killing him. The Court interpreted the general command of reasonableness to create the following rule to govern firing a weapon at an unarmed fleeing suspect:

> Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11. In contrast,

> [w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12.

Garner applies in special circumstances when it is clear that the force used by an officer amounts to deadly force. In that context, *Garner* accurately translates the

general requirement of reasonableness into a specific constitutional rule. However, *Garner*'s special rule is not useful when the question of deadly force is open and unclear; in those circumstances, the general reasonableness test is more appropriate. When an officer tries to stop a vehicle by using direct vehicle contact, the line between force and "deadly force" becomes very difficult to identify. Vehicle contact can range from a very slight touch to a violent collision. The odds that contact will create a substantial risk of death will vary tremendously, and are difficult for an officer to know in the heat of the moment. Given this uncertainty, *Garner*'s framework should be reserved for cases in which the officer would know with certainty that his use of force will be deadly. Applying *Garner* to vehicle-contact cases such as this one would provide the police with very little guidance on when they can use direct contact to stop a fleeing vehicle. The better approach is to apply a general balancing test that focuses on a reasonable officer's perception of what steps will lessen the risk of serious injury or death.

Consider the difficulty an officer faces trying to determine if *Garner* applies to vehicle contact designed to end a high-speed chase. Deadly force generally incorporates the notion of "substantial risk" or "likelihood" of death. *See, e.g.*, MODEL PENAL CODE § 3.11(2) (Proposed Official Draft 1962) (defining "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury"); *Brower*, 489 U.S. at 599 (suggesting that deadly force is action that is "likely to kill" a suspect). However, police officers cannot know the precise odds that a very particular contact in a very particular way creates just enough risk of serious harm to constitute

"deadly force." Every case is different, as the risks depend on the totality of the circumstances. Like close-up street encounters, automobile pursuits "are incredibly rich in diversity." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Contact can occur at different speeds, in different directions, and in different road conditions. Police officers are not mechanical engineers who can calculate the risks of a given contemplated contact in a rapidly evolving police chase. Causation can be difficult to predict, and an officer might intend to contact in one way but end up making contact in a different way.

The Fourth Amendment does not and should not require police officers to make such delicate and complex judgments in the field. "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). The *Garner* test was designed to guide constitutional reasonableness when the use of deadly force is clear. In the case of vehicle contact to end a car chase, however, a general balancing test is both more accurate than *Garner* in this setting and more readily applied by an officer in the field. A general balancing of interests captures reasonableness in the context of an automobile chase far better than *Garner*. Each case is different and depends on the totality of the circumstances, and officers are well equipped to make fact-sensitive decisions as to how to minimize the harms.

Garner guides an officer whose goal is to prevent an unarmed suspect's escape. *Garner*, 471 U.S. at 21 ("Officer Hymon could not reasonably have believed that Garner – young, slight and unarmed – posed any threat. . . . [T]he armed burglar would present a different situation."). In automobile pursuits, *the fleeing suspect's means of escape is also his weapon*. The suspect does not choose whether to escape *or* risk harm to others; by continuing to flee, the suspect chooses to escape *and* risk harm to others.

Reasonable efforts to stop a dangerous vehicle can be analogized to searches and seizures justified by exigent circumstances. Last Term's decision in *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006), is instructive. In *Stuart*, four police officers responded to a late-night call about a loud party at a home. Upon arriving at the home, they heard shouting from inside, and through a screen door observed a fight taking place in the kitchen. The officers entered the kitchen to stop the fight. A unanimous Court held that the officers' entry into the home was constitutionally reasonable. "In these circumstances," the Court concluded, "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." *Id.* at 1949. The Court continued,

> Nothing in the Fourth Amendment required [the officers] to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee,

> poised to stop a bout only if it becomes too one-sided.

Id. Because the officers had a reasonable basis for concluding that their acts were needed to avoid injury, and the steps they took were reasonable ones, their entry into the home did not violate the Fourth Amendment. *Id.*[4]

The same principle applies in the context of efforts to end a dangerous high-speed chase. Nothing in the Fourth Amendment requires an officer to wait until the fleeing driver kills someone, or until it becomes clear that a catastrophe is seconds away. The officer is not a referee who can only observe the fleeing vehicle as its driver puts innocent lives at risk. The officer can take steps to seize the fleeing vehicle to protect the public just as officers may enter a home to protect the victim of a fight. So long as the officer's seizure is reasonable, it complies with the Fourth Amendment.

II. THE SEIZURE IN THIS CASE WAS CONSTITUTIONALLY REASONABLE

Under these constitutional principles, the seizure of Harris's car was reasonable. By the time Scott used force to stop Harris's vehicle, Harris had established that his reckless driving posed a substantial and ongoing threat to the public, the officers, and himself. At the time of making contact, Scott faced a dilemma. Harris obviously was not going to stop on his own. If Scott allowed Harris to continue to drive recklessly at such dangerous speeds, there

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[4] Although *Stuart* happened to involve searches, the same principle applies to seizures. *See, e.g., Illinois v. McArthur*, 531 U.S. 326, 332 (2001).

was a significant risk of a crash that could kill or injure innocent bystanders or Harris himself. In that context, Scott reasonably believed that his actions were needed to avoid a greater threat of harm. He acted as a reasonable officer to minimize the harm by using a technique that he reasonably believed would stop Harris's vehicle with as low a risk of harm as Harris's driving allowed under the circumstances.

"Street pursuits always place the public at some risk," *California v. Hodari D.*, 499 U.S. 621, 627 (1991), and it is tragic that Scott's reasonable efforts to stop Harris's vehicle did not produce the safe result that Scott desired. However, the tragedy does not change the fact that the constitutional inquiry is prospective: the question is whether, *at the time Scott made contact*, it was reasonable to believe that making contact would avoid a greater risk of harm. *Graham*, 490 U.S. at 396. Because it is clear from the facts that such a belief was reasonable for an officer in Scott's position, no Fourth Amendment violation occurred.

Consider the threat to public safety Harris posed from the perspective of a reasonable officer in Scott's position. Scott joined the pursuit after it was initiated by another officer and was under the reasonable belief that he was pursuing a suspect who was part of a controlled buy of illegal drugs. As the videotape taken from Scott's squad car reveals, Scott personally observed Harris's reckless and dangerous driving at extremely high speeds, through red lights, past parked cars, and on the wrong side of the road. Scott had personally observed Harris swerve into the parking lot to try to elude the officers who were pursuing him.

And perhaps most importantly, Scott had personally observed Harris at very close range as Harris escaped the parking lot despite Scott's car being placed in the way and the presence of several other squad cars surrounding him. Instead of stopping when Scott's car blocked the exit, Harris hit Scott's squad car, managed to sneak past it, and then sped out of the parking lot and back onto a highway, where Harris quickly accelerated to dangerous speeds and continued to drive recklessly. At that point, it reasonably appeared that Harris was simply unwilling to allow his vehicle to be stopped under any circumstances. Scott had two options: stop Harris's car by force or ignore the continuing threat to public safety.

It was reasonable that Scott chose the former option over the latter. A reasonable police officer could not ignore the ongoing danger and wait until an injury or death occurred. Harris might not have realized that he was no longer being followed, and might have continued to drive recklessly, continuing to put himself and the public at risk. Even if Harris had recognized that he was no longer being followed and had stopped driving dangerously that particular time, he might feel emboldened in the future by recollections of his daring and successful escape. A reasonable officer in Scott's position would not let those public-safety risks go unaddressed. "Nothing in the Fourth Amendment required [Scott] to wait" until someone died or was injured, or until the threat to life and limb was only two or three seconds away. *Stuart*, 126 S. Ct. at 1949.

A reasonable officer would also recognize the public interest in the enforcement of the law. Scott did not know the offense that had led to the initial chase; although he believed the pursuit arose from a controlled buy of illegal drugs, the offense was not announced over the police radio.

Certainly, he knew that Harris likely had committed a number of serious offenses in the course of the chase, above and beyond whatever the initial offense may have been. Those offenses may have included (1) aggravated assault, GA. CODE ANN. § 16-5-21; *Durrance v. State*, 549 S.E.2d 406, 408 (Ga. Ct. App. 2001); (2) simple battery, GA. CODE ANN. § 16-5-23; (3) criminal damage to property, GA. CODE ANN. §§ 16-7-22 and -23; (4) criminal interference with government property, GA. CODE ANN. § 16-7-24; (5) obstruction of an officer, GA. CODE ANN. § 16-10-24; *Dukes v. State*, 622 S.E.2d 587, 588 (Ga. Ct. App. 2005); (6) eluding, GA. CODE ANN. § 40-6-395; (7) reckless driving, GA. CODE ANN. § 40-6-390; and (8) intentional operation of a motor vehicle to create danger to persons or property, GA. CODE ANN. § 40-6-251. The governmental interest in enforcement of the law, combined with the interest in public safety, made it a reasonable decision to stop Harris's car using force rather than ignore the ongoing threat to public safety.

Scott's means of stopping Harris's vehicle was reasonable as well. Unfortunately, Harris was driving his car at such a dangerously high speed that Scott's options were limited. As the videotape of the incident reveals, Harris was driving at very high speeds, many miles per hour over the speed limit. However, there was no sign that Harris planned to slow down. In addition, there was no indication of any conditions ahead that might force Harris to change his speed to a point where it would be easier to stop Harris's vehicle more safely. Scott asked for and obtained permission to stop Harris's vehicle. He had originally planned to execute a PIT maneuver, which at appropriate speeds can spin the vehicle to a stop, but he realized that Harris was driving too fast for a PIT maneuver to work

safely. Instead, Scott tried to "bump" Harris's car with his push bumper.

Finally, Scott's execution of his decision to stop Harris's vehicle by making physical contact was also reasonable. Scott did his best to pick a part of the road that would minimize the threat to both the public and Harris. Scott selected a part of the road that was straight and flat, and he intentionally picked a part of the road where there were no other cars. The difference between the speed of the two cars at the moment of contact was slight. Given the options that Scott faced, his attempt to stop Harris's fleeing vehicle by "bumping" it was an objectively reasonable choice.

By the time he made contact with Harris's vehicle, Scott and his fellow officers had exhausted all other means of neutralizing the serious risk of bodily harm and death that Harris created by his manner of driving. They had flashed blue lights at him, turned on their sirens, and blocked intersections; Scott even attempted to block the exit from the shopping center. Harris ignored or evaded all of these means. Scott reasonably believed that Harris had to be stopped by force, and he picked a way to do so that was as reasonable as could be expected in light of the very difficult circumstances Harris created by his dangerous driving.

The Eleventh Circuit concluded that the seizure was unreasonable under *Garner*. *Harris*, 433 F.3d at 813. However, the Eleventh Circuit's analysis was flawed. First, *Garner* should not apply because vehicle contact, such as the contact in this case, is not "deadly force." The classic example is firing a gun in a person's direction, as in

Garner. Bumping a fleeing car is very different. As the Eleventh Circuit recognized in a similar case,

> A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person. A gun is an instrument designed for the destruction of life or the infliction of injury, and death or injury *will result* if a person is struck by a bullet. While an automobile is capable of lethality, it is not designed to kill or injure; and even when automobiles strike each other, death and injury may well not result.

Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam).

Here, the contact between the two vehicles is consistent with an attempt to stop Harris's vehicle, not to kill him. Scott approached Harris's vehicle cautiously and even called off the sweeping motion required for a PIT maneuver because of Harris's speed. The difference in speeds between the two cars at the moment of contact was small, and the contact itself was a bump from the rear, not a continual ramming off the road. Considering the use of force at its moment of application, as this Court must under *Graham*, Scott's contact with Harris's vehicle should not be understood as a use of deadly force.

Second, even if *Garner* applies, the facts of this case satisfy the *Garner* test. Scott had probable cause to believe that Harris's outrageous driving posed a continuing danger to the public. Probable cause refers to a "fair probability," *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and in this case there was a fair probability that Harris posed "a threat of serious physical harm, either to the officer or

to others." *Garner*, 471 U.S. at 11. Scott saw Harris cross double yellow lines to pass cars in his way, driving on the wrong side of the road at speeds reaching 100 miles per hour on a curving two-lane road at night. Scott even observed Harris crash into Scott's own vehicle and then continue to drive on in the same reckless manner as before. In light of that experience, captured on videotape, Scott clearly had "probable cause to believe that [Harris] pose[d] a threat of serious physical harm, either to the officer or to others." *Id.*

In its decision, the Eleventh Circuit ruled that Scott lacked probable cause because under Harris's version of the facts, Harris was not driving dangerously:

> [T]aking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

Harris, 433 F.3d at 815-16 (citations omitted). Although disputed facts must be construed in Harris's favor at summary judgment, this characterization of the facts does not accurately summarize the totality of the circumstances from "the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. For example, as the videotape reveals, the road had not been cleared of motorists even though Peachtree City officers, unbeknownst to Scott,

were attempting to block off some of the intersections. Likewise, while Harris managed to remain largely in control of his vehicle, the question is not whether Harris *ended up* causing injuries, but rather whether probable cause – i.e., a fair probability – existed that Harris posed "a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. In other words, the probable cause inquiry is prospective; it focuses on the chances that the suspect raises a threat of future danger based on past and present conduct. The officer's focus is not on Harris's ability to escape unharmed, but on protecting the public from the ongoing risk of harm. In this case, the evidence of Harris's reckless and dangerous driving amply demonstrated probable cause that satisfies *Garner*.

III. IT WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT THAT SCOTT'S USE OF HIS PUSH BUMPER TO END THE PURSUIT VIOLATED HARRIS'S FOURTH AMENDMENT RIGHTS

If this Court concludes that Scott violated the Fourth Amendment, the Court should nonetheless reverse under the doctrine of qualified immunity. Scott's decision to use his push bumper to protect the lives of innocent persons from the risks created by Harris's dangerous driving did not violate "clearly established" law. To find otherwise would reduce the requirement of "fair and clear warning" that Scott's conduct violated the Fourth Amendment to no warning at all. *Hope v. Pelzer*, 536 U.S. 730, 746 (2002).

Qualified immunity applies when an officer acting in his official capacity makes a reasonable mistake as to the facts, the law, or some combination of the facts and law

surrounding a police investigation. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). The doctrine recognizes that the police may make understandable errors and that the difficult task of protecting the public without fear of harassing litigation demands a rule other than strict liability. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Immunity for law enforcement officers is rooted in the policy consideration that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974).

An officer conducting a search is entitled to qualified immunity if "a reasonable officer could have believed" that the search was lawful "in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Of course, "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. "It could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

> But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that [the Court's] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639. Here, the appropriate level of specificity requires the Court to determine whether a

reasonable officer could have believed that Scott's use of his push bumper to terminate the risk posed by Harris's dangerous and reckless vehicular flight to be lawful, in light of clearly established law and the information Scott possessed.

The answer is clearly "yes." At the time of this incident, no case had held that vehicle-to-vehicle contact used to end an automobile chase violated the Fourth Amendment. For example, in *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923 (11th Cir. 1993) (en banc) (per curiam), the Eleventh Circuit adopted Judge Edmondson's dissent in a vacated panel decision involving a high-speed chase through a residential neighborhood that lasted about ten miles. The pursuing officer "intentionally rammed the automobile several times," and after the last contact the fleeing vehicle spun out of control and was "demolished." *Adams*, 962 F.2d at 1565. A passenger in the fleeing vehicle died from injuries sustained in the crash. *Id.*

The Eleventh Circuit did not decide whether the officer's conduct in that case was an unreasonable seizure. Instead, the Eleventh Circuit adopted Judge Edmondson's view that the officer was entitled to qualified immunity because there were no cases "stating or even hinting that ramming a speeding car that presents danger to the public would be an unreasonable seizure under the Fourth Amendment." *Id.* at 1578. Judge Edmondson's opinion noted that vehicle-to-vehicle contact was very different from a shooting, and suggested that it was inappropriate to analyze the legality of a vehicle contact case under *Garner*. *Id.* at 1574 ("I think *Garner*'s facts are too different from this case.").

The Seventh Circuit reached a similar decision the following year in *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994), where the officers ended a high-speed chase by ramming into the suspect who was on a motorcycle. The Seventh Circuit reasoned that because the suspect had been on a motorcycle rather than in a car, the use of the car in that context was deadly force. *Id.* at 949. Much like the Eleventh Circuit in *Adams*, the Seventh Circuit in *Donovan* did not resolve whether the ramming violated the Fourth Amendment. Instead, the court resolved the case on the ground that the officer was entitled to qualified immunity. *Id.* at 950.

Even more on point is *Weaver v. State*, 63 Cal. App. 4th 188 (1998), in which a California state court held that officers did not violate the Fourth Amendment when they used vehicle-to-vehicle contact to end a pursuit where the driver had not lost control of his vehicle nor driven at particularly high speeds, but had violated many traffic laws. The driver had at one point pulled into a residential driveway, and an officer had partially blocked the exit. However, the driver was able to "squeeze back out of the driveway, after striking the front bumper" of the officer's patrol car. The patrol car was not damaged, and the pursuit continued. *Id.* at 194. The officer eventually concluded that he would use vehicle-to-vehicle contact to end the pursuit for safety reasons; the contact led the fleeing car to crash, and a passenger in the car was badly injured. The court held that the officer's seizure of the fleeing car was constitutionally reasonable under the circumstances of that case:

> [The driver] exhibited a wanton disregard for public safety and a willingness to persist in violent conduct to evade the police, even ramming a

> police car in his attempt to escape when he clearly had an opportunity to stop the pursuit in a safe manner when he had pulled into a driveway.

Id. at 208-09. In addition to *Weaver*, a number of cases had held that firing a weapon into the passenger compartment to stop a fleeing vehicle was permitted under the Fourth Amendment where the violator's reckless driving threatened the safety of officers and civilians. *See, e.g.*, *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (passenger injured by bullet fired at fleeing vehicle); *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (driver shot in the head); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (driver shot and killed).

As these cases suggest, it was not clearly established in 2001 that Scott's conduct violated Harris's rights. Furthermore, the most analogous case (*Weaver*) upheld vehicle-to-vehicle contact, and several cases have authorized firing a gun to stop reckless drivers in appropriate settings. The federal appellate cases declined to answer how the Fourth Amendment applies to vehicle-to-vehicle contact. No authorities clearly established that Scott's use of his push bumper was unconstitutional.

This Court's per curiam summary reversal in *Brosseau v. Haugen*, 543 U.S. 194 (2004), is directly on point. In that case, Officer Brosseau shot Kenneth Haugen in the back as he attempted to flee in his vehicle. Brosseau had responded to a report that some men were fighting in the yard of Haugen's mother. Upon Brosseau's arrival, Haugen ran through the yard and hid in the neighborhood, forcing Brosseau to call for assistance. After

30 to 45 minutes of searching, an officer reported that a neighbor had seen a man in her backyard. When Haugen saw Brosseau running in his direction, he fled into a Jeep and locked the door. Brosseau believed that Haugen went to the Jeep to retrieve a weapon. Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the car. Haugen ignored her command repeatedly, as Brosseau tried to break the window by hitting it with her gun. A fight followed, and in the midst of it, Haugen started the Jeep. At this point, Brosseau jumped back and fired one shot, hitting Haugen in the back. Haugen later filed a Fourth Amendment claim against Brosseau. *Id.* at 195-97.

The Court did not reach the merits of the Fourth Amendment issue, but reversed the Ninth Circuit's decision that had denied Brosseau qualified immunity. The Court stressed that *Garner* and *Graham* offered only very general guidance. Such general guidance was insufficient to strip the officer of qualified immunity in the context of most excessive force claims, as "this area is one in which the result depends very much on the facts of each case." *Id.* at 201. The Court stated,

> The Court of Appeals . . . proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. Of course, in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law. See *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly

> established). See also *Pace v. Capobianco*, 283 F.3d 1275, 1283 (C.A.11 2002) (explaining in a Fourth Amendment case involving an officer shooting a fleeing suspect in a vehicle that, "when we look at decisions such as *Garner* and *Graham*, we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply" to the situation at hand). The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision.

Id. (some citations omitted).

The same reasoning applies to this case. As far as counsel are aware, no court has *ever* ruled that conduct such as Scott's violates the Fourth Amendment. If that is to become the law, it is obviously not a standard that was clearly established on March 29, 2001. For the Eleventh Circuit to hold to the contrary, the panel had to implicitly overrule its en banc precedent in *Adams* and tease apart the facts of *Brosseau*. *Harris*, 433 F.3d at 812 n.5, 819. Given the very strong reasons why the seizure should be deemed reasonable, and particularly the strong public interest in ending dangerous automobile pursuits, it was certainly reasonable for Scott to conclude that his conduct comported with the Fourth Amendment's concerns.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775

PHILIP W. SAVRIN
Counsel of Record
SUN S. CHOY
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000

Counsel for Petitioner

(2)

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In The
Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR CERTIORARI

CRAIG T. JONES*
EDMOND & JONES, LLP
127 Peachtree Street, NE, Suite 410
Atlanta, Georgia 30303
(404) 525-1080

ANDREW C. CLARKE
BOROD & KRAMER
80 Monroe Avenue, Suite G-1
Memphis, Tennessee 38103
(901) 524-0200

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

All police officers in this case unanimously admit that deadly force was used against a fleeing suspect at a time when the suspect admittedly posed no immediate threat to any human life.[1] In short, the extraordinary facts of this case not only authorize, but demand a finding that the defendant officer used excessive force in violation of clearly established precedent under the Fourth Amendment.

The sole issue presented by this appeal is whether the District Court correctly held that Petitioner Scott, who admittedly used deadly force against a fleeing traffic offender who did not pose an immediate threat to human life, is entitled to qualified immunity as a matter of law.[2]

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[1] As noted by the Court of Appeals in the underlying opinion *Harris v. Coweta County*, 433 F.3d 807, 814-815, n. 8 (11th Cir. 2005): "See also Scott's Depo., R. 48 at 157-58, (testifying that ramming Harris' vehicle at high speeds constituted a use of deadly force under the CCSD Deadly Force Policy); Fenninger's Depo., R. 50 at 62-63 (testifying that he gave authorization to make contact with the understanding that he was authorizing the use of deadly force). See also testimony of other Coweta County and Peachtree City officers stating that they considered that ramming a vehicle at 90 mph could constitute a use of 'deadly force.' Reynolds' Depo., R. 49 at 118-119; Yeager's Depo., R. 54 at 59; Kinsey's Depo., R. 51 at 44; Ercole's Depo., R. 47 at 37-40." Further, in Defendants' Statement of Material Facts in support of their Motion for Summary Judgment, the Defendants admitted that at the time of the ramming, there were no other motorists in the area, to wit: "Scott decided to make direct contact with his push bumper, ***while no other motorists were in the area.***" (R. 36 – Stat.. Mat. Facts No. 13) (emphasis added). It is also admitted in the Petition for Writ of Certiorari that "Scott decided to make this contact **while no other motorists appeared to be in the area** . . . " (Petition at 5-6) (emphasis original).

[2] There are two steps to the qualified immunity inquiry. A court must first determine whether the facts alleged, taken in the light most

(Continued on following page)

Because the law governing the use of force against nonviolent fleeing offenders was clearly established by prior decisions of this Court, and because the application of clearly established law to the facts of this case requires the resolution of disputed facts by a jury, Petitioner is not entitled to qualified immunity as a matter of law and the case should be remanded for trial.

This case is governed by a trilogy of decisions by this Court which gave fair warning that the conduct which occurred in the case was unconstitutional in the year 2001, and those decisions were correctly applied by the courts below. In the seminal case of *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court unanimously ruled that it is a Fourth Amendment violation for a police officer to use deadly force to seize a fleeing felony suspect who "poses no immediate threat" to human life. 471 U.S. at 9-10.

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favorable to the plaintiff, show that the government official's conduct violated a constitutional right. If a violation can be made out, the court must then ask whether the right was clearly established. *See Saucier v. Katz*, 533 U.S. 194 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). All that is required is that "**in the light of pre-existing law, the unlawfulness must be apparent.**" *Id.* (emphasis added). *See also United States v. Lanier*, 520 U.S. 259, 271 (1997) (law is clearly established where a "general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question"). In determining whether the law is clearly established, "the salient question . . . is whether the state of the law [at the time of the alleged conduct] gave [officials] **fair warning** that their alleged [conduct] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added).

> . . . The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment . . . The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. **It is not better that all felony suspects die than that they escape.**

Id. (emphasis added). In this case, Victor Harris was a teenage traffic offender, not a fleeing felon, so the Court's reasoning in *Garner* is even more compelling:

> Where the suspect poses no **immediate** threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

Id. at 9-10 (emphasis added).

Garner's focus upon reasonableness was expanded by *Graham v. Connor*, 490 U.S. 386 (1989), which held that all claims resulting from the use of force against a suspect eluding capture – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. 490 U.S. at 388.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," [Cite omitted] however,

> its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an **immediate** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

Id. at 396 (emphasis added). In short, *Graham* requires what was implicit in *Garner*: that the force used be proportional to the threat. Unless the suspect is posing an immediate threat to human life, there is no justification for the use of force which is likely to kill or cause serious injury to the suspect.

The third case of the trilogy, *Brower v. County of Inyo*, 489 U.S. 593 (1989), applied these principles to the use of an automobile as a weapon, holding that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied" – regardless of whether the "means intentionally applied" is a bullet, a fist, or a deliberate high-speed collision. 489 U.S. at 597. *Brower* distinguished the case of a deliberate collision amounting to a seizure from the typical automobile negligence claim as follows:

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, [citations omitted] but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . . Thus, if a parked and unoccupied

> police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. **If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.**

Id. at 596-597 (emphasis added). In the case at bar, Victor Harris was rendered a quadriplegic at age 19 by a deliberate collision which was clearly capable of causing death or serious injury. Despite Petitioner's euphemistic characterization that he merely "made contact" with Mr. Harris's vehicle (Petition at 5-6), police videotapes show that Petitioner accelerated rapidly and rammed his patrol car squarely into the rear of Harris' Cadillac, knocking it out of control and sending it airborne off the road and over a steep embankment. (R. 36 – MSJ at Ex. A) This intentional ramming was dramatically more forceful than the hypothetical 'sideswipe' which the Court uses to illustrate its holding in *Brower*.

The record is also clear that when Petitioner radioed his supervisor for permission to ram the vehicle, the supervisor radioed back: "Go ahead, take him out." (R. 50 at 54-55) When asked in his deposition to explain the meaning of "take him out," the supervisor testified that he was authorizing the use of deadly force, whether that consisted of ramming Harris' car at high speed or shooting him with a gun. (R. 50 at 62-63) Every police officer who was deposed in this case – from the sheriff down to the supervisor and the Petitioner himself – admitted under oath that the ramming of Harris' car under the circumstances of this case constituted the use of deadly force, and Respondent has judicially admitted that the ramming

occurred at a time when Harris was driving away from him and there were no other motorists in the immediate area.[3] Whether the ramming constituted deadly or non-deadly force, it was undeniably an intentional termination of Harris' movement and thus a seizure governed by the Fourth Amendment, and Petitioner has not disputed that point.[4] The reasonableness of the seizure is a question for jurors to decide under Fourth Amendment law which has been clearly established since 1989 – the year that *Graham* and *Brower* were decided and four (4) years after the Court's unanimous proclamation in *Garner*. Application of the holdings of this trilogy of landmark Supreme Court decisions to the facts of the instant case clearly provided the Petitioner with "fair warning" that his conduct violated the Fourth Amendment. *Hope*, 536 U.S. at 741.

Petitioner Scott relies heavily on the Court's recent decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004), but *Brosseau* does not alter the foregoing analysis. In its decision below, the Court of Appeals thoroughly addressed *Brosseau* as follows:

> The establishment of these principles distinguishes this case from *Brosseau v. Haugen*. In Brosseau, the Supreme Court reversed the denial of qualified immunity to an officer sued for *Fourth Amendment* violations under *§ 1983* for shooting a suspected felon as he attempted to

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[3] See Footnote 1, *supra*.

[4] "Moreover, the fact that striking the car during the police chase constituted a seizure is not in dispute in this case, as the officer who rammed Harris does not, and could not under the circumstances of this case, contest that he seized Harris." 433 F.3d at 813, fn. 5.

flee in a vehicle, where the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area.[5] Unlike Harris, Haugen, the suspect in Brosseau, was a suspected felon with a no-bail warrant out for his arrest, with whom Brosseau, the officer, had a violent physical encounter prior to the shooting. Believing that Haugen had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep, and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity – the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere

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[5] Footnote in Court of Appeals' opinion: "These facts are not comparable to those in Harris. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an immediate risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S. Ct. 1694. Unlike the situation in Brosseau, the parties were not in close physical proximity nor had they had a one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from behind in their squad cars. At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a residential neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force." *Harris*, 433 F.3d 807, 819 at fn. 14.

nearby), a woman and her 3-year-old child in a small vehicle parked directly in front of the Jeep and 4 feet away, and two men in a parked vehicle 20 to 30 feet away. In addition, prior to shooting, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit Haugen in an attempt to get the keys.

Looking to Garner, the Brosseau Court recognized that its clearly established deadly force rule (i.e., that "it is unreasonable for an officer to 'seize an unarmed non dangerous suspect by shooting him dead' ") was limited by the Court's further instruction that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 598, 160 L. Ed. 2d 583 (quoting *Garner,* 471 U.S. at 11, 105 S. Ct. 1694). Thus, the Brosseau Court held that Garner did not provide a reasonable officer with fair notice of a *Fourth Amendment* violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id. at 600* (emphasis supplied).[6]

---

[6] Footnote in Court of Appeals' opinion: "We also note that the Court in *Brosseau* acknowledged that the standard in *Garner* can 'clearly establish' whether or not the use of deadly force is unconstitutional in an 'obvious case.' *Brosseau,* 125 S. Ct. at 599; *United States v. Lanier,* 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ('general constitutional rule already identified in the decisional law . . . applied with obvious clarity to [his conduct].'). It is well-established

(Continued on following page)

433 F. 3d at 819. Petitioner's reliance on *Brosseau* is misplaced because none of the *Garner* preconditions on the use of deadly force are present. The Fourth Amendment principles set forth in the Supreme Court trilogy of *Garner*, *Graham* and *Brower* apply to this case with "obvious clarity" and give "fair warning" that Petitioner's conduct violated clearly established law when he used deadly force to apprehend a fleeing misdemeanant who posed no immediate threat to the officers or others. *Lanier*, 520 U.S. at 271; *Hope*, 536 U.S. at 741.

The District Court, which was affirmed by the Court of Appeals, properly analyzed the Fourth Amendment claim against Petitioner as follows:

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that 'general statements of the law' are perfectly capable of giving clear and fair warning to officers even where 'the very action in question has [not] previously been held unlawful.' *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034).... While we need not conclude that the facts in Harris present just such an 'obvious' case to deny Scott qualified immunity, this case may present such circumstances, since the evidence shows that Scott lacked the sufficient probable cause to warrant the use of deadly force. In this way, Harris is more like *Vaughan* than *Brosseau* or the cases cited therein. See *Vaughan*, 343 F.3d at 1333 ('applying Garner in a common-sense way' to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit where the suspect posed no immediate threat of harm to police officers or others). In the cases relied upon in *Brosseau*, the officer had arguable probable cause to believe that the suspects presented an immediate risk of danger to the officers or others. See *Brosseau*, 125 S. Ct. at 600. Without the existence of an immediate threat of harm to the officers or others that could justify the officer's probable cause, the *Garner* rule prohibiting deadly force may apply with 'obvious clarity.'" *Harris*, 433 F.3d 807, 819 at fn.15 (quoting *Lanier*, 520 U.S. at 271) (internal citations omitted).

> [A] fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force – ramming the car while traveling at high speeds – was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. [citation omitted] Thus, *a fact issue* remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris.

(Petition at 40a). After determining that there were genuine issues of material fact with respect to the question of whether Scott violated Plaintiff's Fourth Amendment rights, the District Court then discussed whether Scott's conduct violated clearly established law:

> Having concluded that the facts alleged could establish a constitutional violation, the Court now turns to Scott's defense of qualified immunity. In deciding whether Scott is protected by qualified immunity, the Court must determine whether Harris's rights were clearly established – that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful. *See Saucier v. Katz*, 533 U.S. 194, 201-202 (2001). "It is well settled that a constitutional right is clearly established only if its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" [citation omitted] (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Supreme Court, however, has cautioned that in applying the qualified immunity analysis, courts should not be unduly rigid, but rather should see

> if the law gave the defendant "fair warning" that the alleged conduct was unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). . . .
>
> In the present case, the facts indicate that Scott did not know the underlying charge when he decided to join in the chase or at the time that he rammed the vehicle. . . . ***Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury.***

(Petition at 41a-42a) (emphasis added).

Because the District Court's denial of qualified immunity turned upon the determination that there were facts requiring jury resolution, this case did not qualify for immediate review under *Mitchell v. Forsyth*, 421 U.S. 511 (1985) and its progeny. Under *Johnson v. Jones*, 515 U.S. 304, 319-320 (1995), the determination of whether there are genuine issues of material fact which preclude the defense of qualified immunity is not immediately appealable. Nonetheless, the Court of Appeals accepted jurisdiction of the interlocutory appeal over Respondent's objection and then proceeded to affirm the ruling of the District Court which denied Petitioner's claim of immunity. While it remains the Respondent's position that *certiorari* should not be granted, Respondent respectfully submits that the issue of interlocutory appellate jurisdiction under *Johnson v. Jones* would be fairly included

within the question presented in the event that the Petition were to be granted.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

CRAIG T. JONES*
EDMOND & JONES, LLP
127 Peachtree Street, NE, Suite 410
Atlanta, Georgia 30303
(404) 525-1080

ANDREW C. CLARKE
BOROD & KRAMER
80 Monroe Avenue, Suite G-1
Memphis, Tennessee 38103
(901) 524-0200

Counsel for Respondent

**Counsel of Record*

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No. 05-1631

In The
Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

CRAIG T. JONES*
EDMOND & JONES, LLP
127 Peachtree Street, NE, Suite 410
Atlanta, Georgia 30303
(404) 525-1080

ANDREW C. CLARKE
BOROD & KRAMER
80 Monroe Avenue, Suite G-1
Memphis, Tennessee 38103
(901) 524-0200

Counsel for Respondent

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether Respondent can show that his Fourth Amendment rights were violated when Petitioner used deadly force to terminate a police pursuit by ramming Respondent's vehicle at a time when he posed no immediate threat to human life, and when Respondent was merely a fleeing traffic offender who was not violently resisting apprehension at any time during the course of the pursuit.

II. Whether clearly established law in 2001 gave fair warning to a reasonable police officer that it is a Fourth Amendment violation to use deadly force to terminate a pursuit by ramming the vehicle of a fleeing traffic offender at a time when the offender poses no immediate threat to human life, and when the offender is merely fleeing and has not violently resisted apprehension at any time during the course of the pursuit.

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JURISDICTIONAL STATEMENT

Respondent Victor Harris denies that the Court has jurisdiction over this case as Petitioner Timothy Scott is clearly attempting to argue the evidentiary sufficiency of the factual findings made by the District Court and affirmed by the Court of Appeals. Because the District Court's and the Court of Appeals' denial of qualified immunity turned upon the determination that there were facts requiring jury resolution, this case did not qualify for immediate review under *Mitchell v. Forsyth*, 421 U.S. 511 (1985) and *Johnson v. Jones*, 515 U.S. 304, 319-320 (1995).

On September 25, 2002, the District Court entered an Order denying Scott's motion for summary judgment based on qualified immunity. (J.A. 38-64). In denying Scott's motion, the District Court expressly determined that genuine issues of material fact exist which must be resolved by the jury regarding Scott's entitlement to the defense of qualified immunity as a matter of law. (J.A. at 46-51). On appeal, the Court of Appeals[1] affirmed the District Court's finding that genuine issues of material fact exist which preclude Scott's entitlement to qualified immunity as a matter of law. (J.A. at 66-68, 76-79).

Scott's overriding argument on appeal is that the District Court erred in finding that genuine issues of material fact exist which preclude summary judgment on the basis of qualified immunity. *See, e.g.*, Petitioner's Brief, pp. 23-24. Scott's attempt to argue the evidentiary

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[1] In the Court of Appeals, Respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Request for Jurisdictional Question under 11th Cir. R. 31-[illegible]r, Alternatively, for Extension of Due Date for Appellee's Brief which were denied.

sufficiency of the record on interlocutory appeal is clearly prohibited by *Johnson v. Jones*, supra, which held as follows:

> This case concerns government officials – entitled to assert a qualified immunity defense in a "constitutional tort" action – who seek an immediate appeal of a district court order denying their motions for summary judgment. The order in question resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. We hold that the defendants cannot immediately appeal this kind of fact-related district court determination.

515 U.S. at 307.

> [A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of material fact for trial.

Id. at 319-320.

The Court affirmed this principle in *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998):

> We also declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency.

It is clear from his brief that Petitioner Scott fails to appreciate not only the standard under which the evidentiary record must be viewed on a motion for summary judgment, but also the proper basis for interlocutory appellate jurisdiction. Instead, Scott attempts to re-argue the material facts determined by the District Court and affirmed by the Court of Appeals in an attempt to manufacture a "hazy border" under which he can claim the protection of qualified immunity. Such an attempt to question the evidentiary sufficiency of the factual findings of the District Court is clearly prohibited in an interlocutory appeal from a denial of qualified immunity. Because Scott fails to accept the facts in the record in the light most favorable to Harris and is simply arguing the evidentiary sufficiency of the factual findings made by the District Court, the Writ of *Certiorari* should be dismissed as improvidently granted.

STATEMENT OF THE CASE

To the extent that the Court reaches the merits of Scott's appeal, F.R.C.P. 56 requires that the evidence on summary judgment be viewed in the light most favorable to Harris. Putting aside Scott's shading of the record and viewing the evidence in its proper light, the following facts must be taken as true for purposes of this appeal:

On March 29, 2001, at approximately 10:42 p.m., Deputy Clinton Reynolds of the Coweta County Sheriff's Department (CCSD) was stationed on Highway 34 when he clocked Harris' vehicle traveling 73 mph in a 55 mph zone. (R. 49 at 72-73, 75). Deputy Reynolds flashed his blue lights to attempt to get Harris to slow down. (*Id.* at

73, 75). Deputy Reynolds testified that if Victor Harris had slowed down, Deputy Reynolds would not have even initiated a traffic stop. (*Id.* at 77). As Harris' vehicle passed by Deputy Reynolds' police car, it "was still doing seventy three miles per hour." (*Id.* at 73-77). Based solely on the traffic offense of speeding 73 mph in a 55 mph zone, Deputy Reynolds decided to pursue Victor Harris. (*Id.*)

Shortly after commencing the pursuit, Deputy Reynolds obtained Harris' vehicle's license plate number and broadcast this information to his dispatcher. (R. 49 at 81-83). The vehicle that Victor Harris was driving was registered in his name and at his proper address. (R. 45, Res. Sta. Facts – Ex. A). However, Deputy Reynolds failed to broadcast any information concerning the underlying charge that precipitated the pursuit (which was speeding). (R. 48 at 116-117, 159-160; R. 50 at 34-37). Scott neither knew nor requested any information pertaining to the underlying basis for the pursuit until the pursuit was concluded. (*Id.*)

Pursuant to the CCSD's pursuit policy, officers should not have engaged in this pursuit as the offense which precipitated the pursuit was only speeding and they had Harris' license plate number which would have allowed the officers to apprehend Harris at a later date. (R. 45, Aff. Alpert at 11-12). At some point during the pursuit, Deputy Reynolds' dash-mounted video camera activated.[2] (R. 49 at

[2] There are four police videotapes which captured portions of the pursuit. The video recorders in the officers' patrol cars record automatically once the emergency equipment is activated. There are two videotapes from CCSD deputies: 1) Deputy Reynolds (#78) and Petitioner Scott (#66). These videotapes were attached to Scott's Motion for Summary Judgment as Exhibit A. (R. 36). The videotapes made by Peachtree City officers, Officer Ercole and Sgt. Brown, were copied onto

(Continued on following page)

77-70; R. 36, Ex. A – Video). The pursuit began in Coweta County, Georgia and ended at Peachtree City in Fayette County, Georgia near Harris' home.

Despite not being requested to join the pursuit and having no information regarding the basis for the pursuit, Scott unilaterally decided to assist Deputy Reynolds in his pursuit of Harris. (R. 49 at 82; R. 48 at 116-118, 159-160). In Scott's overzealousness to join the pursuit, it appears that he drove his patrol car at speeds well over 100 mph and actually forced motorists off the road. (R. 36, Ex. A – Video).

After Harris entered Peachtree City, Harris slowed his vehicle, turned on his blinker and entered an empty drug store parking lot. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). When Harris turned into the parking lot, there were two Peachtree City Police Department (PCPD) officers in their squad cars in the parking lot. (R. 46 at 7). The Peachtree City officers were not informed that a pursuit was heading into their jurisdiction. (R. 46 at 11-12). This is important because Peachtree City police officers are equipped with "stop sticks" which can be placed across the roadway to flatten a vehicle's tires slowly to safely terminate a pursuit. (R. 46 at 15-16). Had the PCPD been apprised of the pursuit, they could have attempted to deploy the stop sticks. (R. 46 at 14-16). Deputy Reynolds followed Harris into the parking lot. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). Harris drove through the parking lot towards Highway 74. (*Id.*) As

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a single videotape and attached to Harris' Response to Scott's Statement of Material Facts as Exhibit D. (R. 45). On the videotape containing the videos from the PCPD, Officer Ercole's video is first followed by Sgt. Brown's video.

Harris was traveling through the parking lot, there was no vehicular or pedestrian traffic present that would have been endangered by the pursuit. (*Id.*) Scott was traveling too fast to make the turn into the parking lot. (R. 49, Ex. 6).

After missing the entrance to the parking lot, Scott turned right at the next corner and sped around the other side of the parking lot, where he attempted to block Harris from exiting onto Highway 74 by driving his vehicle directly into the path of Harris' vehicle. (R. 36, Ex. A – Video; R. 45, Ex. D – Video; R. 49 at 91, 97, Ex. 6; R. 48 at 175, Ex. 1). Peachtree City officers were not involved in any manner in attempting to stop Harris from exiting the parking lot. (R. 46 at 14-16, 19-20).

As Harris was attempting to exit the parking lot onto Highway 74, Scott drove his vehicle directly into Harris' lane of traffic. (R. 36, Ex. A – Video). The police videos indicate that: 1) Scott drove his vehicle directly into Harris' lane of traffic; 2) Harris turned his vehicle to the left to avoid contact with Scott's vehicle; 3) Scott turned his police vehicle to the right in an effort to "box in" Harris; and 4) minor contact occurred between Harris' and Scott's vehicles. (*Id.*; R. 49 at 91, 97, Ex. 6; R. 48 at 175, Ex. 1). Peachtree City's Sgt. Brown observed this incident and noted in his official report that he saw "one Coweta County unit ram the Cadillac." (R. 46, Ex. 1).

After the pursuit left the parking lot, Sgt. Brown and the PCPD officers did not join the pursuit because they were not informed of the underlying reason for the pursuit. (*Id.* at 4-16). Sgt. Brown testified that a pursuit for a speeding violation would be in violation of the PCPD Pursuit Policy which only allows pursuits for violent

felonies. (*Id.* at 42-43; R. 56, Ex. 6). After leaving the parking lot, the Peachtree City police officers simply followed the pursuit from a distance in an effort to assist the pursuing officers and clear the intersections in the path of the pursuit. (R. 56 at 13; R. 46 at 13-16; R. 47 at 8-10, 22-23). Sgt. Brown ordered his fellow Peachtree City officers to block all intersections on the pursuit route. (R. 46 at 13, 14-16, 19-20). The Peachtree City police officers followed Sgt. Brown's orders and immediately blocked off the intersections on the pursuit route which significantly reduced any danger from the pursuit.

After the pursuit left the parking lot, Scott requested to be the primary pursuing unit stating over the radio, "Let me have him 78 [Reynolds], my car's already tore up."[3] (R. 36, Ex. A – Video at 22:47:22). Scott then took over as the lead pursuing vehicle by passing both Deputy Reynolds and PCPD Officer Ercole. After becoming the lead pursuing vehicle, Scott requested permission from his supervisor, Sgt. Fenninger, to use a PIT maneuver[4] on Harris. (R. 48 at 142-144; R. 50 at 54-55).

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[3] Harris denies that Scott's vehicle was "tore up" as there was little, **if any**, visible damage to his vehicle. (R. 48, Ex. 13).

[4] The Court of Appeals' opinion notes that the PIT maneuver is " 'a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point of the vehicle, which throws the car into a spin and brings it to a stop.' This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight 'safely.' *See e.g.*, Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speed on wide straightaways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT 'is not applicable in every situation, the key to its effective use

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Significantly, neither Scott nor Sgt. Fenninger had any training on the use of the PIT maneuver. (R. 48 at 137-139). Scott claims that he learned about the PIT maneuver by talking informally with other members of the CCSD who had received the training prior to this incident (R. 49 at 137-141). However, this testimony is disputed because Sheriff Yeager confirmed that no one from the CCSD had been trained or certified in the use of the PIT maneuver prior to this incident. (R. 54 at 49-50). Scott's own expert, Michael Brave, testified that a PIT maneuver cannot be used at speeds of 80-100 mph and that there is no question that Scott did not attempt a PIT maneuver on Harris. (R. 57 at 198, 201-202).

Sgt. Fenninger was monitoring a different radio frequency when the pursuit began. (R. 50 at 31). After another officer advised Sgt. Fenninger of the pursuit, Sgt. Fenninger began to monitor the pursuit. (*Id.* at 31-33). Sgt. Fenninger responded to Scott's request for permission to PIT by stating over the radio, "Go ahead and take him out. Take him out." (R. 36, Ex. A – Video at 22:47:50; R. 50 at 54-55). Sgt. Fenninger testified that when he told Scott to "take out" Mr. Harris, Sgt. Fenninger was authorizing Scott to use *deadly force* to terminate the pursuit. (R. 50 at 62-63). After Sgt. Fenninger told Scott to "take out" Harris, Deputy Reynolds broadcast over the radio, "We're running about 90 now, we got several Peachtree City units

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is to carefully choose a favorable stop before attempting PIT and to first consider the possible effects on other traffic and pedestrians'); National San Diego Department Use of Force Task Force Recommendations, Executive Summary at 37 ('Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible'.)" *Harris v. Coweta County*, 433 F. 3d 807, 816-817 (11th Cir. 2005). (J.A. at 80).

blocking our road." (R. 36, Ex. A – Video at 22:48:02; R. 49 at 111-112).

At the time of the above referenced transmissions, the pursuit was traveling southbound on Highway 74. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). At this point, Highway 74 is a two-lane highway without a shoulder and with steep embankments or culverts on either side of the road. (R. 36, Ex. A – Video; R. 45, Ex. D – Video). At the time of the pursuit, the road was wet. (R. 48 at 193). Scott judicially admits that there were no motorists in the area who were in danger from the pursuit. (J.A. at 8-9, 28-30)

Despite these conditions, Scott sped up his patrol car and rammed it into Harris' vehicle. (R. 36, Ex. A – Video; R. 48 at 143). It is undisputed that Scott did not perform a PIT maneuver, and that he could not have performed a PIT maneuver under these conditions even if he had received PIT training. (R. 48 at 143; R. 57 at 198, 201-202; R. 49 at 123). It is probable that Scott never attempted to perform a true PIT maneuver since he was never trained in its application. To any objectively reasonable officer trained in the PIT maneuver, it would have been readily apparent that it could not be performed under the circumstances: i.e., while traveling at high speeds on a wet, two-lane highway with no shoulders, and with deep culverts or embankments on each side. As a result of being rammed by Scott, Harris' vehicle left the roadway and flew off an embankment, flipped and came to rest against a telephone pole, causing severe and permanent injuries to Victor Harris. (R. 36, Ex. A – Video; R. 45, Ex. D – Video; R. 50 at 54-55).

Immediately after Scott rammed Harris' vehicle, Deputy Reynolds notified dispatch that "it's going to be a

bad 10-50 [car accident], get them to start an ambulance." (R. 36, Ex. A – Video). Sgt. Mark Brown of the PCPD was following the pursuit and arrived on the scene within seconds of the wreck. Sgt. Brown's initial reaction to Scott's ramming of Harris illustrates the egregiousness of this conduct to a reasonable police officer. Upon witnessing the ramming, Sgt. Brown exclaimed into his microphone: "Jesus Christ, what the . . . ?" (R. 45, Ex. D – Video at 22:49:00) and "Fucking, they rammed him!" (*Id.* at 22:49:14). Shortly thereafter, the tape indicates that either Scott or Deputy Reynolds thanked Sgt. Brown for stopping all traffic on the pursuit route. (*Id.* at 22:52:49). Thereafter, an unidentified officer is heard saying: "Damn brother, that was fucking cool." (*Id.* at 22:53:24).

After this incident, Deputy Reynolds filled out an incident report listing the charges to be placed against Harris as: 1) speeding – 73 mph in 55 mph zone; 2) speeding – 100+ mph in a 55 mph zone; and 3) fleeing and eluding police. (R. 49, Ex. 6). No other crimes or offenses were listed on the incident report. Thereafter, Deputy Reynolds signed and filed an Application for Criminal Arrest Warrant for: 1) speeding – 73 mph in a 55 mph zone (R. 49, Ex. 4); 2) fleeing and attempting to elude (R. 49, Ex. 5); and 3) reckless driving (R. 49, Ex. 6). No additional Applications for Criminal Arrest Warrants were signed or filed by Deputy Reynolds. Despite the fact that warrants were issued for these traffic violations, Harris was never prosecuted for these or any other offenses.

While Harris admits that he violated traffic laws during the pursuit, Harris denies that he drove in such a reckless manner as pose a clear and present danger to the public as he was in control of his vehicle until it was rammed off the road by Scott. (R. 36, Ex. A – Video; R. 45,

Ex. D – Video). During the course of the pursuit, Harris did pass some vehicles on a double yellow line in violation of the traffic laws. (*Id.*) However, at least eight (8) times during the pursuit, Harris utilized his blinkers while passing or making turning movements. (*Id.*) Harris admits he ran a red light at the intersection of Highway 34 and Fisher Road. (*Id.*) However, there were no vehicles attempting to cross the intersection when he proceeded through it. While Harris exceeded the speed limit during the pursuit, Harris stayed in control of his vehicle. (*Id.*) After entering Peachtree City, Sgt. Brown ordered his officers to block intersections on Highway 74 which significantly diminished the risks to the public. Harris slowed his vehicle at the intersection of Highway 74 and Kelly or Crosstown. (*Id.*) After this intersection, there were no other motorists in the path of the pursuit. (J.A. at 8-9, 28-30; R. 48 at 147, Ex. 1; R. 49 at 121-123; R. 47 at 28, 47; R. 50 at 60). Significantly, at no time during the course of the pursuit did Harris ever use his vehicle offensively in an attempt to assault or strike the officers or any other motorist. (R. 36, Ex. A – Video; R. 45, Ex. D – Video).

Incredibly, Scott argues in his brief that reasonable officers would not have known that ramming a vehicle at 90 mph on a wet, narrow, two-lane road bordered by deep culverts and steep embankments constituted the use of deadly force. This argument defies logic and common sense and illustrates Scott's flagrant disregard for the factual record. His own department's Use of Force Policy provided a clearly understandable definition of "deadly force," stating as follows: "Force which, under the circumstances in which it is used, is readily capable of causing death or other serious injury is considered deadly force." (R. 48, Ex. 12). Furthermore, the CCSD Use of Force

Policy provides that "Facts unknown to a Deputy, no matter how compelling, cannot be considered in later determination whether the use of lawful force, particularly deadly force, was justified." (*Id.*) Based on this objective definition, Scott's conduct was an obvious use of deadly force, because it cannot be disputed that ramming a vehicle at high speeds is "capable of" causing death or serious injury. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120; R. 47 at 37-40). In fact, this conduct is not only "capable of" causing death or serious bodily injury, but is almost certain to cause death or serious bodily injury. (*Id.*)

Further, Scott unequivocally testified that: 1) he knew that a police vehicle can be used as an instrument of deadly force (R. 48 at 18-22); 2) when he rammed Harris' vehicle, he knew that it was likely that Harris would be injured or killed (R. 48 at 157); and 3) when he rammed Harris' vehicle, he was utilizing deadly force. (R. 48 at 158). More importantly, all members of the CCSD who were questioned about whether Scott's use of his patrol car to ram Harris' vehicle constituted deadly force clearly testified that this conduct amounted to the use of deadly force. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120). Even Scott's expert, Mr. Brave, acknowledged in an article he authored that deliberately ramming a vehicle at high speed constitutes deadly force. (R. 57 at 171-172; R. 45, Ex. B – "What is a Good Pursuit").

As previously noted, it is judicially admitted that Scott's ramming of Harris' vehicle occurred at a time where there were no other motorists in the area. (J.A. at 8-9, 28-30). As Harris posed no immediate threat to the officers or others, the use of deadly force against Harris was objectively unreasonable and violated long-standing

and clearly established law. (R. 45 – Aff. Alpert at 11; R. 47 at 34-35; R. 57 at 171-172; R. 45, Ex. B – "What is a Good Pursuit").

SUMMARY OF ARGUMENT

If the Court determines that the merits of Scott's appeal can be reached, it is clear that this case must be analyzed under the factual record set forth by Harris herein as found by both the District Court and Court of Appeals. Based on a proper analysis of the record, Harris submits that both the District Court and Court of Appeals properly found that genuine issues of material fact exist regarding whether Scott is entitled to summary judgment. The sole issue presented in the merits of this appeal is whether the District Court and the Court of Appeals correctly held that Scott, who admittedly used deadly force against a fleeing traffic offender who did not pose an immediate threat to human life, is not entitled to qualified immunity as a matter of law.

All police officers who testified on the issue acknowledge that deadly force was used against Harris at a time when Harris admittedly posed no immediate threat to any human life. In short, the extraordinary factual record in this case not only authorizes, but demands, a finding that Scott used excessive force in violation of Harris' Fourth Amendment rights. To hold otherwise would immunize from constitutional liability all law enforcement officers who knowingly apply deadly force in circumstances when no life is in immediate danger in order to seize a fleeing traffic offender. Such a grave intrusion into a citizen's constitutional right to be free from the use of excessive

and deadly force under the Fourth Amendment has never been tolerated and violates this Court's clearly established precedent and common sense.

This case is governed by a trilogy of decisions by this Court that gave "fair warning" that the conduct which occurred in the case was unconstitutional in the year 2001, and those decisions were correctly applied by the courts below. In the landmark case of *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that a police officer who uses deadly force to seize a fleeing felony suspect who "poses no immediate threat" to human life violates the Fourth Amendment. 471 U.S. at 9-10. In this case, Victor Harris was a teenaged, fleeing traffic offender, not a fleeing felon, so the Court's reasoning in *Garner* is even more compelling.

Garner's focus upon reasonableness was expanded by *Graham v. Connor*, 490 U.S. 386 (1989), which held that all claims resulting from the use of force against a suspect eluding capture – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. 490 U.S. at 388. In short, *Graham* requires what was implicit in *Garner*: that the force used be proportional to the threat. Unless the suspect is posing an immediate threat to human life, there is no justification for the use of force which is likely to kill or cause serious injury to the suspect.

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court applied these principles to the use of vehicles to seize a fleeing suspect, clearly establishing that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied" – regardless of whether the "means intentionally

applied" are a bullet, a fist, or a deliberate high-speed collision. 489 U.S. at 597.

The above referenced trilogy of cases applies to the facts of the instant case with obvious clarity and provides Scott with more than adequate notice that his conduct violated clearly established law. Furthermore, the analysis of these cases by the lower courts in high-speed pursuit cases serves to further clarify that these holdings apply with obvious clarity to the instant case.

ARGUMENT

In determining whether a state actor is entitled to qualified immunity, the Court undertakes a two-step inquiry. The Court first determines whether the facts alleged, taken in the light most favorable to the plaintiff, show that the government official's conduct violated a constitutional right. If a violation can be made out, the Court then asks whether that right was clearly established. *See Saucier v. Katz*, 533 U.S. 194 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). All that is required is that "in the light of pre-existing law, the unlawfulness must be apparent." *Id.* The law can be clearly established where a "general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question." *United*

States v. Lanier, 520 U.S. 259, 271 (1997). In determining whether the law is clearly established, "the salient question . . . is whether the state of the law [at the time of the alleged conduct] gave [officials] fair warning that their alleged [conduct] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

I. A proper view of the record shows that Respondent's Fourth Amendment rights were violated when Petitioner used deadly force to terminate a police pursuit by ramming Respondent's vehicle at a time when he posed no immediate threat to human life, and when Respondent was merely a fleeing traffic offender who was not violently resisting apprehension at any time during the course of the pursuit.

The first step of *Saucier's* two-part analysis requires the plaintiff to establish a constitutional violation. To determine whether a seizure violates the Fourth Amendment, this Court has long required a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983). Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

In the landmark case of *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court applied this balancing test in holding that the Fourth Amendment is violated when a police officer uses deadly force to seize a fleeing felony suspect

who "poses no immediate threat" to human life. *Id.* at 9-10.

> The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment . . .
>
> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no **immediate** threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

Id. at 9-10 (emphasis added).

The Court in *Garner* did recognize that limited circumstances might justify the use of deadly force, to wit: (1) "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm," **and** (2) if deadly force is "necessary to prevent escape," **and**, (3) "if,

where feasible, some warning has been given." *Id.* at 11-12. Without meeting all of these conditions, the use of deadly force is constitutionally unreasonable.

According to *Garner*, police may not use deadly force to apprehend a fleeing felon unless the suspect poses an **immediate** threat to the life of the officer or some other person. It is essentially a "defense of life" standard. (R. 45 – Alpert Aff. at 7). Scott acknowledges that *Garner* establishes a bright-line rule regarding deadly force applications noting that, "*Garner* applies in special circumstances when it is clear that the force used by an officer amounts to deadly force. In that context, *Garner* accurately translates the general requirement of reasonableness into a specific constitutional rule. However, *Garner*'s special rule is not useful when the question of deadly force is open and unclear." (Petitioner's Brief, pp. 13-14).

In order to avoid complying with the *Garner* preconditions in evaluating whether Scott violated Harris' constitutional rights, Scott simply attempts to argue that Scott, or any reasonable officer for that matter, should not have known that ramming a vehicle at ninety (90) mph constitutes deadly force. The argument that neither Scott nor any objectively reasonable officer would understand that ramming a vehicle at 90 mph is the use of deadly force is a distortion of the record and an affront to any reasonable law enforcement officer. This specious argument lies at the heart of Scott's attempt to manufacture a "hazy border" under which he can claim the protection of qualified immunity, but the facts of this case are clearly governed by the rule set forth in *Garner*.

While *Garner* did not define "deadly force," it is clear that its holding is not limited to firearms but applies to all

applications of deadly force. A survey of the Circuits, including the court below, shows that deadly force has been uniformly defined as any use of force which creates a substantial likelihood of causing death or serious bodily injury.[5] The uniformity of this definition is reinforced by the fact that it has been widely adopted by modern police agencies, and indeed, Scott's agency, the CCSD, defined deadly force in precisely this manner. (R. 48, Ex. 12).

Under this objective definition, Scott's ramming of Harris' car was clearly the use of deadly force since it was substantially certain that death or serious bodily injury would result from contact between the vehicles at high speed, and the testimony in the record is unanimous on that point. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120; R. 47 at 37-40). Scott unequivocally testified that: 1) he knew that a police vehicle can be used as an instrument of deadly force (R. 48 at 18-22); 2) when he rammed Harris' vehicle, he knew that it was likely that Harris would be injured or killed (R. 48 at 157); and 3) when he rammed Harris' vehicle, he was utilizing deadly force. (R. 48 at 158). More importantly, all members of the CCSD who were questioned about whether Scott's use of his patrol car to ram Harris' vehicle constituted deadly force clearly testified that this conduct

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[5] *See, e.g., Pruitt v. City of Montgomery*, 771 F. 2d 1475, 1479 n. 10 (11th Cir. 1985); *Gutierrez v. City of San Antonio*, 139 F. 3d 441, 446 (5th Cir. 1998); *Estate of Phillips v. City of Milwaukee*, 123 F. 3d 586, 593 (7th Cir. 1997); *In re City of Philadelphia Litigation*, 49 F. 3d 945, 966 (3rd Cir. 1995); *Ryder v. City of Topeka*, 814 F. 2d 1412, 1416 n. 11 (10th Cir. 1987); *Robinette v. Barnes*, 854 F. 2d 909, 912 (6th Cir. 1988); *Mattis v. Schnarr*, 547 F. 2d 1007, 1009 n. 2 (8th Cir. 1976) (*en banc*), *vacated as moot sub nom., Ashcroft v. Mattis*, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977).

amounted to the use of deadly force. (R. 54 at 58, 96; R. 51 at 44; R. 50 at 62-63; R. 48 at 153, 157; R. 49 at 117-120). Even Scott's expert, Mr. Brave, acknowledged in an article that deliberately ramming a vehicle at high speed constitutes deadly force. (R. 57 at 171-172; R. 36, Ex. B – "What is a Good Pursuit").

Garner's focus upon reasonableness was expanded in *Graham v. Connor*, 490 U.S. 386 (1989), which held that all claims resulting from the use of force against a suspect eluding capture – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. 490 U.S. at 388.

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, [Cite omitted] however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an ***immediate*** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9.

Id. at 396 (emphasis added). In short, *Graham* requires what was implicit in *Garner*: that the force used be proportional to the threat. Unless the suspect is posing an immediate threat to human life, there is no justification for the use of force which is likely to kill or cause serious injury to the suspect.

Finally, in *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court addressed whether a suspect fleeing from police who runs into a "deadman's roadblock" was "seized" under the Fourth Amendment. In holding that a

police officer's use of an automobile to create a roadblock to stop a fleeing suspect constituted a "seizure," the Court noted that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied" – regardless of whether the "means intentionally applied" is a bullet, a fist, or a deliberate high-speed collision. *Id.* at 597. *Brower* distinguished the case of a deliberate collision amounting to a seizure from the typical automobile negligence claim as follows:

> Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. ***If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.***

Id. at 596-597 (emphasis added).

Brower summarily discarded the argument that Brower's flight from police precluded a finding that that Brower was subjected to a Fourth Amendment seizure:

> While acknowledging *Garner*, the Court of Appeals here concluded that no "seizure" occurred when Brower collided with the police roadblock because "[p]rior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained" and because "[h]e had a number of opportunities to stop his automobile prior to the impact." 817 F. 2d, at 546. Essentially the same thing, however, could have been said in *Garner*. ***Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of***

> ***his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.***

Id. at 595 (emphasis added).

Since the 1980's, this trilogy of Supreme Court rulings has defined the contours of the Fourth Amendment in use of force cases. Based on these decisions, it is clear that:

1) The Fourth Amendment is violated when a police officer to uses deadly force to seize a fleeing suspect who "poses no immediate threat" to human life. *Garner*, 471 U.S. at 9-10.

2) All claims resulting from the use of force against a suspect – whether involving deadly or non-deadly force – are to be analyzed under the Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 388.

3) In analyzing the objective reasonableness of use of force against a suspect, the force must be proportional to the threat. *Id.* at 396.

4) A seizure occurs whenever there is a governmental termination of freedom of movement through means intentionally applied. *Brower*, 489 U.S. at 596. The use of a police vehicle to sideswipe or ram a vehicle causing it to crash is a seizure which must meet the objective reasonableness standard of the Fourth Amendment. *Id.* at 597.

5) A suspect's flight from police officers does not reduce or eliminate an officer's responsibility for

acting reasonably when seizing a suspect. *Id.* at 595.

In applying these bedrock constitutional principles to the case at bar, it is clear that Scott violated Harris' constitutional rights under the Fourth Amendment when the record is viewed in the light most favorable to Harris. Scott's contention that there are no genuine issues of material fact as to whether Scott's conduct violated Harris' constitutional rights completely disregards both the record and the factual findings of the District Court.

Despite Scott's argument to the contrary, the undisputed proof in the record indicates that Scott's ramming of Harris was an application of deadly force as it was obvious that this conduct may cause death or serious bodily injury. As such, the *Garner* pre-conditions for the use of deadly force must be considered. Under *Garner*, deadly force could not be utilized against Harris unless: 1) Harris posed an immediate threat to officers or others; or there was probable cause to believe Harris committed a crime involving the infliction, or threatened infliction, of serious physical harm; and 2) deadly force was necessary to prevent escape; and 3) a warning was given, if feasible.

Scott has judicially admitted that the application of deadly force was performed at a time when no other motorists were in the area and Harris was driving away from Scott. Thus it is clear that neither Scott nor any third parties were in immediate danger at the time of the application of deadly force.

Moreover, the underlying crime which precipitated the pursuit was a traffic offense which is not a crime involving the infliction or threatened infliction of serious physical harm. In fact, Harris' crime was so minor that Deputy

Reynolds testified that he would not have even initiated a traffic stop if Harris had slowed down after he flashed his blue lights. The fact that traffic offenses are not considered serious enough to justify dangerous police activity is reflected in the growing trend in modern police departments that have specifically precluded high-speed pursuits of traffic offenders and restricted their use to violent felonies only.[6]

While Scott argues that Harris' conduct during the course of the pursuit created the necessity for the use of deadly force, both the District Court and Court of Appeals found, when viewing the record in the light most favorable to Harris, that Harris' conduct during the course of the pursuit did not entitle Scott to use deadly force to apprehend him because: 1) Harris stayed in control of his vehicle; 2) Harris never used his vehicle offensively as a weapon against the officers or anyone else; 3) Harris was not violently resisting, but simply attempting to flee; 4) Harris was driving away from Scott when deadly force was applied; and 5) at the time of the application of deadly force, there was no one in the immediate area who was endangered by Harris' flight. (J.A. 45-51; 70-90). Ignoring the record and taking Scott's argument to its illogical conclusion, Scott is arguing that deadly force may be used against any person who flees from the police in an automobile – failing to recognize that flight alone does not pose grave dangers to officers or the public in all cases.

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[6] Significantly, the CCSD adopted a "violent felony only" policy after this incident in 2002, thereby aligning itself with the majority of modern police departments. (R. 54, Exs. 4 & 7).

In addition, *Garner* mandates that deadly force only be utilized to apprehend a fleeing suspect when it is necessary. Since the officers had Harris' license plate number[7] and Scott had "personally observed Harris at very close range" (Petitioner's Brief, p. 19), deadly force was not necessary to apprehend Harris at a later time. Based on these facts, Scott could have clearly attempted to apprehend Harris at his home at a later date. Further, the factual record developed in this case clearly indicates that terminating the pursuit would substantially reduce any risks emanating from the pursuit. (R. 45, Aff. Alpert, pp. 7-8).[8] Under the facts of this case, the use of deadly force was not necessary to apprehend Harris and to diminish the risks of the pursuit to the public.

Scott mistakenly suggests that analyzing the case under *Graham* rather than *Garner* would result in a different outcome. *Graham* does not overrule the *Garner* pre-conditions to the use of deadly force but simply acknowledges what was implicit in *Garner*: that any use of force must be proportional to the threat. Under *Graham*, to evaluate whether an officer's use of force is reasonable, careful attention must be paid to the facts of each case which includes: the severity of the crime at issue, whether

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[7] Harris' vehicle was properly registered at his correct home address. (R. 45, Res. Sta. Facts – Ex. A).

[8] Scott implicitly acknowledges this fact in his brief stating, "It is true that police generally have the option of calling off the pursuit, which in some circumstances may lessen the risk." While implicitly acknowledging that termination would reduce the risks of the pursuit, the factual record fully supports this contention as Harris' expert, Dr. Geoffrey Alpert, has unequivocally testified that research has validated this theory and Scott's expert has failed to provide an opinion refuting this testimony. (R. 45, Aff. Dr. Alpert, pp. 7-8).

the suspect poses an **immediate** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Analyzing the *Graham* factors without consideration of the *Garner* pre-conditions results in the same conclusion. The crime which precipitated the pursuit was a traffic offense. Despite Scott's argument that Harris was guilty of a myriad of serious criminal offenses, including felonies, during the course of the pursuit, both the District Court and Court of Appeals properly declined to make that determination as a matter of law. Moreover, Harris was only charged with misdemeanor traffic offenses for which he was never prosecuted, and Scott has judicially admitted that the use of force was applied at a time when no other person was immediately endangered by the pursuit. Most significantly, Harris was merely fleeing – not violently resisting arrest. Under both *Garner* and *Graham*, there are clearly genuine issues of material fact as to whether Scott's use of force against Harris was excessive and thus prohibited by the Fourth Amendment.

This analysis was followed in *Vaughan v. Cox*, 343 F. 3d 1323 (11th Cir. 2003), in which the same Court of Appeals held that the defendant officer was not entitled to qualified immunity as a matter of law for the use of deadly force to apprehend a fleeing suspect during a high-speed pursuit. In *Vaughan*, deputies from the CCSD (the same department as Scott) received information that a red pickup truck had been stolen from a service station. After Deputy Cox observed a vehicle matching the description of the stolen vehicle, he attempted to perform a rolling roadblock by positioning his vehicle in front of the truck. While Deputy Cox was positioned in front of the pick-up truck and Deputy Looney was positioned at the rear, Cox

applied his brakes and the truck ran into the back of Cox's cruiser. Cox testified that the impact caused him to momentarily lose control of his vehicle. However, the occupants of the pick-up truck contended that the impact was both accidental and insufficient to cause Cox to lose control. For the purposes of the appeal, the Court of Appeals accepted the occupant's version of events just as this Court must accept Harris' version of events in the instant action.

After the collision, the suspect vehicle did not stop but accelerated. Deputy Cox then got behind the truck, unholstered his sidearm and rolled down the passenger side window. As soon as Cox pulled his vehicle to the side of the fleeing vehicle, the fleeing vehicle accelerated in its same lane of traffic. Cox then testified that the fleeing suspect swerved his vehicle at him and he fired three shots into the vehicle. However, the occupants of the fleeing vehicle testified that they did not swerve at Cox and Cox fired three shots at them without any warning. Given the procedural posture of the case, the court noted that it was obliged to accept the occupants' version of events. The court concluded "that a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup truck" because the fleeing vehicle arguably posed no "immediate threat of serious harm to Deputy Cox, other police officers, or innocent motorists . . . " *Id.* at 1329-1330. On the other hand, the court noted that "Deputy Cox disputes much of Vaughan's version of the events leading up to the shooting," and . . . "[a] jury accepting Cox's assertions could conclude that Vaughan and Rayson presented a serious threat to Cox or others on the road . . . Nonetheless, our obligation at this stage of the proceedings is to view all of the evidence in the light most favorable to

Vaughan." *Id.* at 1331-1332. The same conclusion is demanded by the facts of the case at bar.

The rules on the use of deadly force established by this Court, and applied by the Court of Appeals in both this case and *Vaughan*, are so well understood that they are embodied in nationally accepted standards of the law enforcement profession which provide that "forcible stopping maneuvers" like the ramming of a vehicle at high speed "should be used ONLY in those instances where the application of deadly force would be justified." (R. 45 – Alpert Aff. at 8-9). The model pursuit policy of the International Association of Chiefs of Police (IACP) prohibits their use altogether, stating that "officers may not intentionally use their vehicle to bump or ram the suspect's vehicle in order to force the vehicle to a stop off the road or in a ditch."[9] (*Id.* at 8). Significantly, Scott's expert authored an article entitled "What is a Good Pursuit" which poses a hypothetical situation very similar to the case at bar, and which offers the following conclusion:

> So, under the *Garner* fleeing felon analysis if the officer's ramming of the car is . . . construed as the application of deadly force, then this use of force (seizure) is clearly 'objectively unreasonable.' The ramming officer now has crossed the

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[9] In the order dismissing the writ of *certiorari* in *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987), the dissent recognized that the IACP specifically acknowledged that ramming a vehicle may only be approved when the use of deadly force was authorized. "See International Association of Chiefs of Police, A Manual of Model Police Traffic Services, Policies and Procedures, Procedure 1.20, p. 91 (1986) ("[B]oxing in, heading off, ramming, or driving alongside the pursued vehicle . . . may be approved only when the use of deadly force would be authorized")." *Id.* at 271, fn. 2.

> line and has violated . . . the Fourth Amendment Constitutional right to be free from unreasonable seizures.

(R. 45, Ex. B – "What is a Good Pursuit").

Based on a proper analysis of the record in the light most favorable to Harris and applying the foregoing precedents, both the District Court and the Court of Appeals correctly found that there are genuine issues of material fact as to whether Scott's actions violated Harris' Fourth Amendment rights. Under the facts in the record, a jury could reasonably conclude that the need to capture a traffic violator does not justify sentencing him to life in a wheelchair, even if that means he gets away, and even if the police are later unable to prove that he was the one driving the car by running his tag number and attempting to arrest him at the house where he has lived his entire life. As reasonable minds can differ as to whether Scott's use of force was objectively reasonable, this matter is left to the sole province of the jury.[10]

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[10] *See, Fisher v. City of Memphis*, 234 F. 3d 312, 317 (6th Cir. 2000); *Posr v. Doherty*, 944 F. 2d 91, 96 (2nd Cir. 1991) (whether the officers believed their use of force was reasonable was properly a jury question); *Trujillo v. Goodman*, 825 F. 2d 1453 (10th Cir. 1987) (inquiry into whether official's use of force was actionable is a factual one depending on the circumstances and in most instances is for the jury); *Bailey v. Andrews*, 811 F. 2d 366 (7th Cir. 1987) (whether officer used excessive force in kicking a suspect was a jury question); *Chew v. Gates*, 27 F. 3d 1432, 1443 (9th Cir. 1994) (whether a particular use of force was reasonable is rarely determinable as a matter of law); *Harvey v. Estes*, 65 F. 3d 784 (9th Cir. 1995) (unreasonable force claims against law enforcement officers are generally questions for the jury); and *Dowdell v. Chapman*, 930 F. Supp. 533 (M.D. Ala. 1996) (reasonableness of force used by law enforcement official under Fourth Amendment's prohibition of excessive force analysis is a question for jury).

II. Clearly established law in 2001 gave fair warning to a reasonable police officer that it is a Fourth Amendment violation to use deadly force to terminate a pursuit by ramming the vehicle of a fleeing traffic offender at a time when the offender poses no immediate threat to human life, and when the offender is merely fleeing and has not violently resisted apprehension at any time during the course of the pursuit.

Since Harris has shown that there are genuine issues of material fact regarding whether Scott violated his Fourth Amendment rights, the next step in the qualified immunity analysis is to determine whether the law was sufficiently clearly established to provide Scott with fair warning that his conduct violated Harris' constitutional rights.

One way to show 'fair warning' is by pointing to a prior case with similar facts, but that is not the only way to do so. *See, e.g., United States v. Lanier*, 520 U.S. 259, 271 (1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 640) (recognizing that a general constitutional rule "identified in the decisional law" may apply with "obvious clarity to the specific conduct in question," even though the challenged conduct has not previously been held unlawful); *see also Hope v. Pelzer*, 536 U.S. 730, 739 (2002). A "rule already identified by the decisional law" can even be derived from dicta in view of *Hope*'s reliance upon "the reasoning, but not the holding," of prior litigated cases. 536 U.S. at 743. In order for the law to be clearly established, it is not necessary to show that "the very action in question has been held unlawful, but it is to say that *in light of pre-existing law* the unlawfulness must be *apparent*. *Anderson*, 483 U.S. at 640 (emphasis added).

Therefore, the "salient question" before this Court is whether the contours of the law which existed on March 29, 2001, were sufficiently clear to give a reasonable law enforcement officer "fair warning" that he could be liable for deliberately ramming a police car into a car driven by a fleeing traffic offender when the fleeing offender posed no immediate risk to the life and safety of the officer or others. *Hope*, 536 U.S. at 741 (citing *Lanier*, supra). While Scott argues that the holdings of the *Garner/Graham/Brower* trilogy are couched in general terms which are too vague to clearly establish the law in this case, Harris submits that these cases articulate an unambiguous rule which applies "with obvious clarity" to this case. *Lanier*, 520 U.S. at 271. The Court's rulings in *Garner*, *Graham* and *Brower* are not limited by their terms to the specific facts of those cases – rather, they clearly and succinctly define the limits of force allowable under the Fourth Amendment.

Harris submits that this Court's rulings in *Garner*, *Graham* and *Brower* clearly establish protections embodied by the Fourth Amendment, to wit: 1) deadly force may not be used to apprehend a fleeing offender unless the offender places the officer or others in immediate danger of death or serious bodily injury; and 2) any use of force by officers – deadly or otherwise – must be proportional to the threat posed by the offender. These principles apply with obvious clarity to the facts of this case and place Scott on notice that his conduct violated this clearly established law. The undisputed facts in the record reveal that: 1) Harris was being pursued for a simple traffic offense; 2) Scott used deadly force when he rammed Harris in an effort to apprehend him; and 3) at the time that Scott used

deadly force, no one was in immediate danger of being harmed.

This is the same analysis which the Court of Appeals applied in *Vaughan v. Cox*, 343 F. 3d 1323 (11th Cir. 2003), a case in which another Coweta County officer used deadly force to terminate a high-speed pursuit – three (3) years prior to the incident in this case. Noting *Hope*'s admonition that courts "should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration," the court held that the state of the law in 1998 gave the officer "fair warning" that his alleged conduct was unconstitutional. *Hope*, 536 U.S. at 741.

> In this case, the danger presented by Vaughan and Rayson's continued flight was the risk of an accident during the pursuit. Applying *Garner* in a common-sense way, ***a reasonable officer would have known*** that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to summary judgment, on qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment.

343 F. 3d at 1332-1333 (emphasis added). Likewise, a reasonable officer would know that ramming a vehicle at 80 to 90 mph on a two-lane road and knocking it off an embankment also "transform[s] the risk of an accident . . . into a virtual certainty" – with similarly "foreseeable consequences." *Id.* Under these circumstances, a reasonable officer would make no distinction between deadly

force through the use of a firearm and deadly force through the ramming of a vehicle.

Scott argues that the only way that Harris could prove that the law was clearly established is to show that, prior to March 29, 2001, a previous case holding an officer liable for violating the Fourth Amendment by finding that making intentional direct contact with a fleeing motorist at high speeds constituted the improper use of deadly force.[11] This argument flies squarely in the face of *Hope* and *Lanier*, where the Court made clear that factually identical precedent is not required where prior rulings give fair warning of constitutional liability. While Scott does not precisely specify what aspect of the law he contends is not clearly established by the previously cited cases, a more particularized analysis of the case law as it existed on March 29, 2001 reveals that the law was sufficiently clear to place Scott on notice that his conduct violated Harris' constitutional rights as far back as the 1980's.

Prior to this incident it was clearly established that an automobile can be utilized as an instrument of deadly force.[12] Even before this Court decided in *Brower v. County*

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[11] In *Lewis v. Brown*, 250 F. 3d 751 (11th Cir. 02/14/01) (table), the Court of Appeals affirmed the denial of qualified immunity to an officer who rammed a suspected speeder. The facts of this case were discussed in *Alderman v. McDermott*, No. 6:03CV41ORL22KRS, 2004 WL 1109541 at 13-14 (M.D. Fla. 01/27/04).

[12] *Smith v. Freeland*, 945 F. 2d 343, 347 (6th Cir. 1992); *Galas v. McKee*, 801 F. 2d 200, 203 (6th Cir. 1986); *United States v. Aceves-Rosales*, 832 F. 2d 1155, 1157 (9th Cir. 1987); *Acosta v. City and County of San Francisco*, 83 F. 3d 1143, 1147 (9th Cir. 1996); *Robinette v. Barnes*, 854 F. 2d 909, 911-912 (6th Cir. 1988); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991).

of Inyo, 489 U.S. 593 (1989) that deliberately causing a suspect's vehicle to crash could rise to the level of a Fourth Amendment violation, the Sixth Circuit noted in *Robinette v. Barnes*, 854 F. 2d 909, 912 (6th Cir. 1988):

> In *Garner*, a police officer seized an unarmed, fleeing burglary suspect when he shot and killed him. Thus, the deadly force in issue in that case was the kind which undoubtedly comes to mind first, a firearm. ***However, many law enforcement tools possess the potential for being deadly force, including*** a state university police officer's nightstick, [citation omitted] and ***a police officer's vehicle.***

854 F. 2d at 912 (emphasis added). Earlier still, *Galas v. McKee*, 801 F. 2d 200 (6th Cir. 1986), noted as follows:

> Without question, high speed pursuits place the suspect, the officer, and the public in general risk of death or serious bodily injury. ***In that respect high-speed pursuits are no different than the use of firearms to apprehend fleeing suspects.***

801 F. 2d at 203 (emphasis added).

Also before *Brower*, it was noted in the dissent to the Court's Order dismissing the writ of *certiorari* in *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 271 fn. 2 (1987) that nationally recognized law enforcement standards indicate that ramming the vehicle of a fleeing suspect was only a proper tactic under circumstances when deadly force was authorized. That footnote contained the following citation: "See International Association of Chiefs of Police, A Manual of Model Police Traffic Services, Policies and Procedures, Procedure 1.20, p. 91 (1986) ("[B]oxing in, heading off, ramming, or driving alongside the pursued

vehicle . . . may be approved only when the use of deadly force would be authorized"). This reference to model law enforcement po'ices was not an isolated occurrence since the Court has considered policies, standards, and reports as evidence of whether the law is clearly established for qualified immunity purposes on other occasions. *See Wilson v. Layne*, 526 U.S. 603 (1999) (policies of United States Marshal Service); *Hope v. Pelzer*, supra (state departmental regulations and a Department of Justice report).

In arguing that the law was not clearly established, Scott cites a number of cases which ultimately granted qualified immunity to officers who had used deadly force to terminate a chase. (Petitioner's Brief, pp. 27-28). However, an examination of these cases reveals that all the cases cited by Scott analyzed the officer's use of deadly force under the *Garner/Graham* analysis discussed herein. Therefore, it is ironic that Scott suggests that this analysis does not apply with obvious clarity to this case. Properly analyzed, the reasoning of the cases cited by Scott all support Harris' argument that Scott's use of deadly force to terminate the chase by ramming Harris' car while no other persons were in immediate danger was unconstitutional under clearly established law.

In *Smith v. Freeland*, 954 F. 2d 343 (6th Cir. 1992), a fleeing suspect drove off the road during the course of a pursuit. *Id.* at 344. After the officer thought the fleeing vehicle had become stuck, the officer moved his vehicle in close proximity to the fleeing vehicle. However, the fleeing vehicle accelerated rapidly and swerved toward the police officer. After the officer took evasive action, the fleeing vehicle again swerved at the police officer and then attempted to flee. The pursuit continued until the fleeing

suspect went down a dead-end street. At the end of the dead-end street, the fleeing suspect attempted to turn around in a citizen's yard. As the fleeing suspect made this turning movement, the officer attempted to block the fleeing suspect. When the officer placed his car in front of the fleeing suspect's vehicle, there was a local swimming pool to his back and a gate to his side. *Id.* Thinking that the pursuit was over, the officer exited his patrol car to apprehend the suspect. However, the fleeing suspect backed up his vehicle and smashed through the gate. As the suspect's car was attempting to pass the police vehicle, the officer fired one shot which killed the suspect. *Id.* Analyzing those facts under *Garner* and *Graham*, the court found that the officer's use of deadly force was reasonable under the Fourth Amendment due to the immediate danger that the suspect posed to the officer and public at the time of the shooting. *Id.* at 345-347.

Similarly, in *Scott v. Clay County*, 205 F. 3d 867 (6th Cir. 2000), the fleeing suspect raced through a stop sign at an intersection, weaved off the pavement and took a turn at high speeds resulting in an officer deciding to initiate a pursuit. During the pursuit, the fleeing suspect narrowly missed hitting another officer who was outside of his patrol car. *Id.* at 872. The pursuit ranged at speeds of 85 to 100 mph and lasted over 20 minutes. The fleeing suspect admitted that he specifically drove at least one motorist off the road. During the chase, the fleeing suspect lost control of his vehicle and crashed into a guard rail. As the officer exited his vehicle, the suspect accelerated at the officer who was forced to jump out of the way. As the fleeing suspect attempted to get back on the highway he drove his vehicle at an approaching officer's car. The original pursuing officer shot at the vehicle, striking the passenger.

Holding that the officer was entitled to qualified immunity under the *Garner/Graham/Brower* analysis, the court concluded that the officer's use of deadly force was reasonable because the undisputed facts indicated that the fleeing suspect: 1) had committed serious, life-threatening crimes; 2) was an immediate threat to the officer; and 3) was actively resisting arrest. *Id.* at 876-878.

In *Cole v. Boone*, 993 F. 2d 1328 (8th Cir. 1993) the fleeing suspect was driving a tractor-trailer at speeds up to 90 mph, passed traffic on both shoulders of the highway in heavy traffic and attempted to ram several police cars. *Id.* at 1330. The pursuing officers attempted a rolling roadblock but were unsuccessful. Thereafter, the officers shot the tires of the tractor-trailer with a shotgun which was successful, but failed to stop the vehicle. The officers set up a roadblock which left an escape route in case the fleeing suspect refused to stop. The fleeing suspect ran through the roadblock, but the officers were able to shoot holes in the radiator and tires. After a more than 50-mile pursuit which forced no less than 100 cars off the road and during which the fleeing suspect repeatedly attempted to ram police cars, the officer shot the driver to terminate the pursuit. *Id.* at 1331. In analyzing the constitutional liability of the officers, the court applied the *Garner/Graham* analysis. Based on the violent resistance of the fleeing suspect, the court easily found that the use of deadly force by the officer was reasonable. *Id.* at 1333-1334.

The most interesting case cited by Scott in support of his argument is *Weaver v. State*, 63 Cal.App.4th 188 (Cal.App. 1998). In *Weaver*, a 14-year-old driving a stolen car threw what were believed to be drugs out of the car and led police officers on a wild, two-hour chase over

freeways and through residential areas, even ramming a police vehicle. As the fleeing suspect was circling through residential streets, so many bystanders had come out of their houses that the pursuit route resembled a parade route. *Id.* at 208. Throughout the pursuit, the pursuing officer considered using the PIT maneuver but felt that the conditions were not right. *Id.* at 194. According to the officer, the PIT maneuver could not be used safely at speeds over 35 mph. *Id.* at 195. The officer further testified that the PIT maneuver is not intentional crashing or ramming. *Id.* However, after two hours of pursuit, the officer executed a PIT maneuver on the fleeing suspect at a point of the pursuit route where no pedestrians or motorists were present, causing the suspect to suffer serious injuries. The officer testified that he was traveling no more than 35 mph when he performed the PIT, but according to an accident report completed by another officer using aerial videotapes, the PIT was performed at a speed of 47-49 mph. *Id.* at 95. The plaintiff's expert opined that if the officer was traveling over 35 mph when he performed the PIT maneuver, it would have been an application of deadly force. *Id.* at 198-199.

Reviewing that record under the *Garner/Graham/Brower* analysis, the *Weaver* court acknowledged that the dispute over the speeds of the vehicles (35 mph vs. 45-47 mph) created a genuine issue of material fact as to whether the PIT maneuver was the application of deadly force. *Id.* at 207-208. However, based on the prolonged nature of the pursuit and the aggressive driving of the fleeing suspect – which included the ramming of a patrol car – the court held that the use of the PIT maneuver in this case was reasonable under the Fourth Amendment even if it was found to be deadly force. *Id.* at 207.

Harris submits that the cases offered by Scott provide no support for the argument that the law was insufficiently developed to provide Scott with fair warning that his conduct violated the Fourth Amendment. In fact, the reasoning of these cases clearly supports Harris' position that the *Garner/Graham/Brower* trilogy provides the proper analysis of the case at bar – both in determining whether a constitutional violation occurred (under the first prong of *Saucier*) and whether the law was clearly established (under the second prong). Immunity was granted in the cases cited by Scott – not because of any lack of clarity in the governing law – but because the application of clearly established law to the undisputed facts illustrated that the officers' conduct was reasonable under a *Garner/Graham/Brower* analysis.

Harris submits that these cases illustrate that the state of the law in 2001 was sufficiently developed to provide Scott with fair warning that his conduct violated Victor Harris' clearly established Fourth Amendment rights because these cases all determined that an officer's application of deadly force to terminate a pursuit is governed by *Garner/Graham/Brower.* Therefore, this trilogy of cases applies with obvious clarity to this case and clearly establishes the applicable law. At a minimum, these cases serve to further clarify that the holdings of *Garner/Graham/Brower* apply to cases where force is used to terminate a pursuit.

Scott also argues that the cases of *Adams v. St. Lucie County Sheriff's Dep't*, 998 F. 2d 923 (11th Cir. 1993) (*en banc*) (per curiam) and *Donovan v. Milwaukee*, 17 F. 3d 944 (7th Cir. 1994) support his argument that he is entitled to qualified immunity. However, Scott fails to point out that the incidents in these cases occurred before the decision in

Brower clearly established that using a police vehicle to terminate a pursuit through a roadblock or an intentional sideswiping was a Fourth Amendment seizure. While those two cases held that the officers were entitled to qualified immunity, both courts made this determination based on the fact that *Brower* had not yet been decided, rejecting the argument that *Garner*, standing alone, could clearly establish that a seizure had occurred under the facts of those cases.

Significantly, the Court of Appeals did not decide *Adams*[13] on the basis of whether the officer's ramming of the plaintiff's vehicle amounted to a constitutional violation. The court simply held that the law was not clearly established that ramming a vehicle during the course of a pursuit was a "seizure." Because the basis upon which immunity was granted was that the conduct had occurred before *Brower* clearly established the law, the *en banc* dissenters made certain to point out that "after this opinion, the law is clearly established that law enforcement officers may not use deadly force to apprehend a fleeing misdemeanant." 998 F. 2d at 923. Based on this statement, there can be no dispute that the relevant law was clearly established because Scott applied deadly force upon a fleeing misdemeanant at a time when he posed no immediate threat. Unlike the defendants in *Adams* and *Donovan*, Scott cannot argue in the wake of *Brower* that his conduct was not a Fourth Amendment seizure under

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[13] It should also be noted that *Adams* was decided under prior Eleventh Circuit precedent which required the plaintiff to "prove the existence of a clear, factually defined, well-recognized right of which a reasonable officer would know." *Adams*, 962 F. 2d at 1574. That rigid 'gloss' on the qualified immunity standard was invalidated in *Hope*, supra.

clearly established law, nor does he even attempt to argue that the law is not clearly established on that point.

Finally, Scott argues that this Court's decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004) entitles him to qualified immunity as a matter of law. In *Brosseau*, the Court did not discuss whether the officer's conduct violated the Constitution. Instead, the Court went straight to the second prong of *Saucier* and held that the officer was entitled to qualified immunity because it was not clearly established that shooting a violent suspect who was attempting to flee in a vehicle and posed a serious risk to persons in the **immediate** area was unconstitutional. Again, Scott attempts to latch on to the holding of the cause without any consideration of the factual circumstances of the case. Just as this Court distinguished *Garner* in deciding *Brosseau*, the Court of Appeals made clear that the case at bar is distinguishable from *Brosseau* and is governed by *Garner*. Both *Garner* and the case at bar involve fleeing suspects who were not violently resisting arrest. *Brosseau* is different because it involved a suspect who was violently resisting arrest.

Unlike Harris, the fleeing offender in *Brosseau* was a felony suspect with a no-bail warrant out for his arrest with whom Officer Brosseau had a violent physical encounter prior to the shooting. Believing that the suspect, Mr. Haugen, had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity – the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere nearby), a woman

and her three-year-old child in a small vehicle parked directly in front of the Jeep and four feet away, and two men in a parked vehicle 20 to 30 feet away.

Prior to using deadly force, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit him in an attempt to get the keys. In granting qualified immunity, the Court held that *Garner* did not provide a reasonable officer with fair notice of a Fourth Amendment violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, *when persons in the immediate area are at risk from that flight.*" *Id.* at 200 (emphasis added).

Those facts are not comparable to this case. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an *immediate* risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. Unlike the situation in *Brosseau*, the parties herein were not in close physical proximity nor had they been engaged in a violent, one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from *behind in their squad cars.* At the time of the ramming, Harris was driving in a non-aggressive fashion – i.e., without trying to ram or run into the officers or others. Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a *residential* neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show

little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections by the PCPD. Finally, Scott issued absolutely no warning (over the loudspeaker or otherwise) prior to using deadly force. Therefore, Scott's reliance on *Brosseau* in support of his claim for qualified immunity is misplaced.

Post-*Brosseau* cases do not support Scott's argument that *Brosseau* entitles Scott to qualified immunity. In *Sigley v. City of Parma Heights*, 437 F. 3d 527 (6th Cir. 2005) an officer shot and killed a suspect attempting to flee in a vehicle after an undercover drug buy. Whether the officer was in danger from the flight was hotly contested. *Id.* at 532-533. The officer contended that the plaintiff was driving his vehicle at the officer at the time of the shooting while the plaintiff's witnesses testified that the officer was running after the plaintiff's vehicle at the time of the shooting. Analyzing the facts under *Garner* and *Graham*, the court denied qualified immunity by distinguishing *Brosseau*, noting that the *Garner* pre-conditions that were present in *Brosseau* were not present. The court noted that the officer in *Brosseau* believed the fleeing suspect was retrieving a gun and posed a grave threat to the officers and citizens in the immediate area, while the officer in *Sigley* (viewed in the light most favorable to the plaintiff) was not in danger and was running after the fleeing suspect when the fatal shots were fired. *Id.* at 537. Therefore, the court held that whether qualified immunity applied depended on which version of the facts the jury believed. As such, the officer was not entitled to qualified immunity under clearly established law.

In another post-*Brosseau* case, *Smith v. Cupp*, 430 F. 3d 766 (6th Cir. 2005), the court denied qualified immunity to an officer who used deadly force to apprehend a fleeing suspect under far more egregious facts. In *Smith*, an officer arrested a suspect for placing harassing telephone calls, handcuffed him and placed him in the back seat of the squad car. *Id.* at 769. However, the officer's vehicle was not equipped with a safety partition. After the officer left his vehicle to speak with a tow truck operator, Smith jumped the seat and attempted to drive away in the patrol car. The facts of Smith's actions are strongly disputed. The officer testified that Smith drove the police vehicle at both the officer and tow truck operator. Smith contends that the officer fired the fatal shots after the vehicle had passed the officer and the tow truck operator when no one was in immediate danger. *Id.* at 770-771. Again, the court analyzed the facts under *Garner/Graham*, distinguishing *Brosseau* and holding that the facts when viewed in the proper light created a genuine issue of material fact as to whether the use of deadly force violated *Garner*, precluding summary judgment on qualified immunity grounds. *Id.* at 773-775.

Finally, the same district court which originally handled the *Brosseau* case recently had occasion in *Hayes v. Wickert*, No. C06-54012RJB, 2006 WL 3373051 (W.D. Wash. 11/20/06), to evaluate a case involving the use of deadly force to terminate a pursuit.[14] In *Hayes*, an officer

[14] It should be noted that this district court had found that Officer Brosseau was entitled to qualified immunity, which was reversed by the Ninth Circuit only to have the district court's finding of qualified immunity ultimately reinstated by this Court. Given the court's finding of immunity in *Brosseau*, its analysis in *Hayes* is compellingly persuasive.

commenced a chase of a traffic offender and ultimately resorted to the use of deadly force. The facts of the shooting were contested. The officer claimed that the suspect attempted to drive his vehicle at the officer after the officer exited his vehicle when the officer thought the fleeing vehicle was stuck. However, the plaintiff alleges that after his vehicle became stuck in a ditch, the officer simply got out of his car and shot him without warning. *Id.* at 1. In addressing whether the officer was entitled to qualified immunity, the court analyzed the facts under *Garner/Graham* and found that factual disputes existed which precluded the entitlement to qualified immunity as a matter of law. In addressing *Brosseau* and whether the law was clearly established at the time of the shooting, the court held:

> Under the circumstances alleged, a reasonable officer would have had fair notice that shooting an individual suspected of violating traffic laws and eluding police was unlawful. There are issues of fact as to when Plaintiff began backing his car, and if Plaintiff ['s] version of events is believed, Officer Wickert jumped out of his patrol car and immediately began firing shots. Under those circumstances, Officer Wickert could not reasonably have believed his safety was endangered, and would have fair notice that shooting Plaintiff was unlawful. Moreover, unlike in *Brosseau*, or the other cases cited by Officer Wickert, the record does not contain evidence that there were others in the area whose safety was immediately threatened. A reasonable officer, under the facts alleged by Plaintiff, would have reasonable fair notice that shooting the Plaintiff here was unlawful.

Id. at 6.

While Scott's argument completely disregards the factual record in this case in analyzing his entitlement to qualified immunity as a matter of law, it is clear that both the District Court and the Court of Appeals appropriately determined that genuine issues of material fact exist regarding whether Scott violated Victor Harris' clearly established Fourth Amendment rights. Given the limitations on the use of deadly force that arise under the rule of *Garner* and its progeny – a rule which applies with obvious clarity to the case at bar – the law was sufficiently developed to provide Scott with more than 'fair warning' that his conduct violated Harris' constitutional rights. While Scott appears to be arguing that he is entitled to qualified immunity unless the exact conduct he engaged in was previously held unlawful, that approach was specifically rejected in *Hope* and *Lanier*. At the time of this incident, any objectively reasonable officer would have known that ramming a fleeing suspect at high speeds constituted a seizure by deadly force, and accordingly, it could only be justified under circumstances authorizing the use of deadly force against a fleeing suspect. This much was acknowledged by Scott, who simply argues that his use of deadly force was reasonable under the circumstances – despite the fact that he used deadly force against a nonviolent misdemeanant who was merely fleeing. Based on the record, there are clearly questions which must be resolved by a jury before the questions of qualified immunity can be resolved as a matter of law. Therefore, this case must be remanded to the District Court for trial.

CONCLUSION

Based on the foregoing argument and authority, the Writ of *Certiorari* should be dismissed as improvidently granted, or, alternatively, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CRAIG T. JONES*
EDMOND & JONES, LLP
127 Peachtree Street, NE
Suite 410
Atlanta, Georgia 30303
(404) 525-1080

ANDREW C. CLARKE
BOROD & KRAMER, P.C.
80 Monroe Avenue, Suite G1
Memphis, Tennessee 38103
(901) 524-0200

Counsel for Respondent

**Counsel of Record*

No. 05-1631

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In The

Supreme Court of the United States

TIMOTHY SCOTT,
a Coweta County, Georgia, Deputy,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775

PHILIP W. SAVRIN
Counsel of Record
SUN S. CHOY
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THIS COURT HAS JURISDICTION

Harris opens his brief by renewing his unsuccessful challenges to appellate jurisdiction in the Eleventh Circuit as well as in his brief in opposition to certiorari in this Court based on his reading of *Johnson v. Jones*, 515 U.S. 304 (1995). (Brief for Respondent at 1-3; Response to Petition for Certiorari at 10-12.) The Eleventh Circuit summarily rejected this claim in a footnote: "We reject Harris' first argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision." (J.A. at 69 n.3.) His argument is similarly misplaced here.

A. Material Facts Are Reviewed De Novo

In qualified immunity cases, appellate jurisdiction exists to determine "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Johnson*, 515 U.S. at 312 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)); *see also Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996). Because qualified immunity is effectively lost if a legally immaterial issue goes to trial, a defendant has a right to appeal de novo "whether an asserted federal right was clearly established at a particular time." *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *see also Mitchell*, 472 U.S. at 527-28. Accordingly, the Court must first determine the material facts, which is itself a legal inquiry:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry

> of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In the qualified immunity context, this means that the "legal significance" of the material facts are reviewed de novo. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 621 (5th Cir. 2006).

Materiality is distinct from whether there is a "genuine" issue of fact, which involves such matters as sufficiency of evidence to support legally material facts. *Anderson*, 477 U.S. at 248 ("The materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination.") This distinction is germane to qualified immunity appeals because evidentiary rulings are non-appealable prior to final judgment: "[T]he District Court's determination that . . . this case raised a *genuine issue of fact* concerning petitioners' involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute." *Johnson*, 515 U.S. at 313 (emphasis added). In contrast, a denial of qualified immunity because "material issues of fact remain" triggers appellate interlocutory jurisdiction:

> [R]espondent asserts that appeal of the denial of the summary-judgment motion is not available because the denial rested on the ground that "*material issues of fact remain.*" . . . Denial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that *every* denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because

> they happen to arise in a qualified-immunity case. . . . *Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an "abstract issue of law" relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was "clearly established."

Behrens, 516 U.S. at 312-13 (citations and punctuation omitted) (emphasis added); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996) ("*Behrens* specifically rejected the contention that a district court's holding that material issues of fact remain bars interlocutory appellate review of related issues of law, labeling that contention a misreading of *Johnson*.").

Johnson concerned the appealability of a summary judgment order that "determine[d] only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." 515 U.S. at 313; *see also id.* at 316 (noting that the issue is "the existence, or nonexistence, of a triable issue of fact"). The narrowness of the Court's decision in *Johnson* is underscored by the fact that the *only* issue on appeal was whether or not the defendants committed (or abetted) the battery at issue; "[w]hen asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no." *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994). Given the narrow factual dispute at issue, the court of appeals had no occasion to consider, much less decide, the *legal* question of whether the defendants violated any clearly established rights.

B. *Johnson* Does Not Apply

Harris contends that this Court lacks jurisdiction under *Johnson* because "Scott attempts to re-argue the material facts determined by the District Court and affirmed by the Court of Appeals in an attempt to manufacture a 'hazy border' under which he can claim the protection of qualified immunity." (Brief for Respondent at 3.) By doing so, Harris posits, Scott is questioning the "evidentiary sufficiency of the factual findings made by the District Court." (*Id.*)

Scott's appeal does not involve "a question of evidence sufficiency." Instead, Scott is arguing for precisely what this Court's qualified immunity precedents (including *Johnson*) allow: a de novo review of the lower courts' legal conclusions that the defendant violated clearly established law. *Behrens*, 516 U.S. at 313; *Johnson*, 515 U.S. at 313-14. For example, there can be no dispute that this Court has jurisdiction to review the legal conclusions that (a) "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm," (J.A. at 76); (b) Scott lacked "probable cause to believe that [Harris] posed a substantial threat of imminent physical harm to motorists and pedestrians," (*id.* at 78); (c) "[b]y 2001, it was well-established . . . that 'deadly force' means force that creates a substantial risk of causing death or serious bodily injury," (*id.* at 88); (d) "ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure," (*id.* at 79); (e) "[a] reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force . . . and that [such] deadly force could not be used to apprehend a fleeing suspect unless

the conditions set out in *Garner* existed," (*id.* at 87); and (f) Scott received "'fair warning' that [his] conduct violates a constitutional right through a general constitutional rule." (*Id.*)

These conclusions stand in stark contrast to evidentiary rulings, many of which were captured here on videotape and uncontested, including that Harris was speeding; that Harris used turn signals as he veered across the double-line; that Harris did not hit anyone when he careened through red lights; that Scott did not know Harris's initial offense; that the two vehicles collided when Harris escaped from the parking lot; and that no one was in Harris's immediate path when contact was made. Conclusions as to the constitutionality of Scott's conduct in light of these undisputed facts go to the heart of interlocutory jurisdiction in qualified immunity cases, thereby allowing an immediate appeal in this case.[1]

II. SCOTT'S USE OF FORCE WAS CONSTITUTIONAL

Substantively, Fourth Amendment claims "are evaluated for objective reasonableness based upon the information the

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[1] *Johnson* acknowledged that "it may sometimes be appropriate to exercise 'pendent appellate jurisdiction'" in a qualified immunity appeal over a factual matter, but concluded it would be inappropriate to do so "where the appealable issue appears simply a means to lead the court to review the underlying factual matter." 515 U.S. at 318. Where, as here, the appeal focuses on the legal question of whether the evidence shows a violation of a clearly established constitutional right, a court may exercise pendent appellate jurisdiction over certain factual issues. Although petitioner does not believe it is necessary in this case, this Court could exercise pendent appellate jurisdiction to resolve the fundamental question of qualified immunity at this stage of the proceeding.

officers had when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001). This is so because "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in those situations courts will not hold that they have violated the Constitution." *Saucier*, 533 U.S. at 206.

Harris's arguments in this case hinge on the solitary assumption that *Garner*'s legal framework applies to Scott's use of force, and clearly so. *Garner* does not supplant *Graham*'s "totality of the circumstances" test, but instead applies *Graham*'s factors to the unique situation where a police officer shot an unarmed, nondangerous suspect in the back of the head for the sole purpose of preventing his escape. The suspect in that case was on foot and attempting to scale a fence when he was killed. *Garner* resolved that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). It acknowledged that an "armed burglar would present a different situation," and expressly limited its holding to the facts at issue: "We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did." *Id.* at 21-22.

A suspect using a vehicle to flee at high speeds presents a completely different challenge to law enforcement than an unarmed suspect on foot. By continuing to flee in a vehicle, the suspect does not merely seek to elude capture, but risks harming the public (intentionally or unintentionally) in the process. As a matter of constitutional

doctrine, the limitations on the use of force enunciated in *Garner* simply do not apply to the perils of vehicular flight. Stated otherwise, the risks presented by a driver determined to elude capture in an automobile, at high speeds and in the manner attempted by Harris, present unique exigencies that an officer cannot reasonably anticipate.

Harris insists a jury could find he was nondangerous because he stayed in control of his vehicle and did not try to run anyone off the road, Scott's path was "largely clear," and traffic was relatively light. (Brief for Respondent at 42-43.) Essentially, Harris urges that he was a "safe" reckless driver. This argument tracks the Eleventh Circuit's recognition that Harris "slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road." (J.A. at 78.) It also ignores the undisputed facts, shown on the videotape, that there were motorists on the road and that Harris refused to even slow down in face of lawful commands to stop.

When Scott joined the pursuit, Harris had already failed to yield to Deputy Reynolds's flashing lights and siren; had passed motorists by crossing over double yellow traffic control lines at high speeds; and had raced through a red traffic light. (R. 36, Ex. A, 78-22:48, 78-22:44:36; R. 36, Ex. A, 66-22:45:10; R. 49 at 50; R. 36, Ex. 6.) After Scott responded to Reynolds's call for assistance, Harris tried to escape through the parking lot of a strip shopping center. Scott maneuvered his vehicle to block Harris's egress, but was unsuccessful. Once Harris's vehicle collided with his patrol car, Scott then personally witnessed Harris again racing down a two-lane road at high speeds, crossing double yellow control lines, and running a red light. (R. 36, Ex. A, 66-22:47; 66-22:47:55; 66-22:48:28.) It

was only at that point that vehicle contact was made to end the ongoing threat of harm to the public.

By then, Scott had exhausted less intrusive means, such as lights, sirens, engaging Harris in a pursuit, and attempting to block his exit from the drug store parking lot. "Authorities must be allowed 'to graduate their response to the demands of any given situation.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States v. Place*, 462 U.S. 696, 709 n.10 (1983)). Harris was fairly warned that the police would steadily increase the force unless and until he complied with their lawful command for him to stop his vehicle.[2]

Harris's attempt to portray himself as a mere speeder to whom a citation might have been issued ignores *Graham*'s sharp admonition that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. A reasonable officer in Scott's position would view Harris as someone who had committed numerous offenses, was putting the public at serious risk by driving extremely recklessly on a two-lane road with other vehicles present, and made his unwillingness to stop repeatedly clear.

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[2] The district court stated that "a large part of the responsibility for the parking lot incident rests with Scott who deliberately drove into Harris's line of traffic." (J.A. at 50.) This statement suggests Harris had a right to defy the lawful commands to stop, which is contrary to precedent. *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (noting that "compliance with police orders to stop should . . . be encouraged"); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative or wrongdoing, but it is certainly suggestive of such.").

Harris's assumption that his high-speed vehicular flight is legally indistinguishable from *Garner*'s unarmed burglar on foot has no legitimate basis. Even though he did not injure anyone else during his escapade, Harris knowingly created a risk of harm, which is the definition of recklessness. *See* MODEL PENAL CODE § 2.02(2)(c) (recklessness is the knowing creation of a risk of harm). Because the risks of harm in this case cannot be likened to the absence of harm presented by an unarmed burglar on foot, *Garner*'s analysis of the use of force does not apply. Instead, *Graham*'s more general "totality of the circumstances" test applies, which accords discretion to officers to use force based on objectively reasonable beliefs as to the risks they are confronting.

Harris further assumes that Scott used deadly force, relying on alleged admissions in the deposition testimonies and, once again, on *Garner*. In relying on deposition testimony, Harris overlooks that (a) defense counsel properly objected to witnesses providing legal opinions; and (b) Scott has repeatedly contended in court documents that he did *not* use deadly force. (R. 48 at 157-58; R. 36 at 17; R. 59 at 3.) Further, Scott did not admit that he used deadly force. The actual question posed to Scott was whether "there was *a likelihood* that Victor Harris *could* be seriously injured or in a wreck due to the speed of the vehicles." (R. 48 at 157 (emphasis added).) In his brief before this Court, Harris alters this testimony to contend that Scott "knew that it *was likely* that Harris *would* be injured or killed." (Brief for Respondent at 19 (emphasis added).) As explained below, neither of these statements

articulates the correct Fourth Amendment standard, a legal matter to which Scott did not, and could not, admit.[3]

Harris's remaining basis for contending that Scott used deadly force is the Eleventh Circuit's reliance on *Garner*.[4] *Garner*, however, did not define "deadly force," nor did it need to: Officer Hymon used a firearm, which has been termed the "paradigmatic example of 'deadly force.'" *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998); *see also Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). "Lower courts since [*Garner*] have struggled with whether to characterize various police tools and instruments as 'deadly force.'" *Gutierrez*, 139 F.3d at 446. An oft-cited case in this context is *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), where a police dog was dispatched to bite a suspected burglar who was hiding in a darkened building. Even though the suspect died as a result of the bite, the Sixth Circuit found no use of deadly force. In reaching that conclusion, the court acknowledged that "the mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Id.* at 913. The court modified the Model Penal Code's definition of "deadly force," used for criminal law purposes, as follows:

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[3] Similarly, Harris claims that Scott's expert acknowledged "that deliberately ramming a vehicle at high speed constituted deadly force." (Brief for Respondent at 20.) To the contrary, the expert actually testified that "not every contact, including some ramming of a police vehicle to another vehicle, is deadly force." (R. 57 at 172.)

[4] In contrast, the district court expressly declined to decide whether Scott used deadly force, (J.A. at 47 n.6), finding that a jury should resolve whether his force was "objectively unreasonable" under *Graham*. (J.A. at 49.)

> [T]he two factors most relevant to the determination of whether the use of a particular law enforcement tool constitutes deadly force [are]: the intent of the officer to inflict death or serious bodily harm, and the probability, known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a substantial risk of causing death or serious bodily harm.

Id. at 912 (internal quotation marks omitted). The Ninth Circuit formulated a more restrictive standard: "force reasonably likely to kill." *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660 (9th Cir. 1998), *overruled by Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005).[5]

Some circuits have not reached the issue at all, and even fewer have indicated just how "serious" a threat of bodily injury must be to qualify as "deadly force." The Model Penal Code defines a threat of serious bodily injury as presenting a "substantial risk of . . . serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." MODEL PENAL CODE § 210.0(3). Yet, dropping an explosive on a roof to gain entry to a building was not "deadly force" under *Garner*. *In Re City of Phila. Litig.*, 49 F.3d 945, 966 (3d Cir. 1995). Nor was a dog bite to the suspect's neck considered deadly force, even though dogs are trained to inflict bodily harm, and even though the bite killed the suspect. *Robinette*, 854 F.2d at 912-13.

What is clear is that Scott did not use deadly force under any of these definitions. Although Harris's injuries

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[5] This language mirrors the deadly force claim in *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989), as force "likely to kill."

are severe, Scott's conduct was reasonably calculated under the circumstances to stop Harris, not kill him. Scott did not shoot at Harris or his vehicle. Despite the repeated characterizations of Scott's force as a "ramming," Scott did not crash into the car at a high speed differential or push Harris off the road. As the videotape shows, the road where the contact took place appeared (at night) to be level. (R. 36, Ex. A, 66-22:47:21.)

Even if Scott's conduct amounted to deadly force and the *Garner* conditions govern, his actions were constitutional. Harris disagrees and suggests that under *Garner*, the harm must be "immediate" before justifying deadly force. (Brief for Respondent at 17-18.) By so contending, Harris confuses the immediacy of the threat with the immediacy of the harm. *Garner* requires that the threat be immediate in the sense that the risk of harm is immediately apparent. It does not require that the harm is immediate, in the sense of a split-second away. *Garner* implements the concern that the threat must be immediate by requiring "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. The officer must have probable cause, which requires the officer to assess the seriousness of the threats that are immediately before him. *Cf. Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (in the plain view context, equating the traditional requirement that the incriminating nature of an object must be "immediately apparent" with probable cause to believe that the item is incriminating).

Under *Garner*, a catastrophic harm need not be a split second away before the officer can act. A contrary rule would make it difficult (if not impossible) for an officer to comply with the Fourth Amendment when, as here, a use of force takes time for the officer to execute. The officer

might start to use force at one time only to find that the immediacy had waned at the moment of contact. Alternatively, the officer might not realize that force was needed immediately until it was too late.

In this case, Harris's reckless driving provided ample probable cause to believe that he presented an ongoing threat of serious physical harm under *Garner*. The threat was immediate: Scott personally observed it in the minutes and seconds leading up to his use of force. Based on what he personally observed, he properly determined that Harris presented an immediate threat of serious physical harm to innocent bystanders. Probable cause does not require 100% certainty; it requires a fair probability based on a common-sense practical judgment. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

Harris's driving created a fair probability that he would cause serious physical harm and therefore satisfied *Garner*. *Robinette*, 854 F.2d at 913-14 (under *Garner*, an officer "had probable cause to believe that . . . a suspected felon hidden inside a darkened building in the middle of the night, threatened his safety and the safety of the officers present"); *Ryder*, 814 F.2d at 1419 (under *Garner*, "the officer is allowed to infer that the suspect is inherently dangerous by the violent nature of the crime"). Any other conclusion would require law enforcement officers to either make no physical contact with a fleeing suspect at all *or* wait until a fleeing suspect is seconds away from injuring an innocent person before taking action to neutralize the threat presented. In addition to increasing the threat of harm, such a rule would promote dangerous flight as an efficient means for suspects and

their conspirators to shield contraband and other fruits of their criminal enterprise from disclosure.

The decision of the Eleventh Circuit should be reversed on substantive Fourth Amendment grounds.

III. SCOTT DID NOT VIOLATE CLEARLY ESTABLISHED LAW

If the Court concludes that Scott violated the Fourth Amendment, he would be entitled to qualified immunity because the case law provided no "fair warning" – either in March 2001 or even today – that the use of a vehicle to terminate a pursuit was unconstitutional under the circumstances presented.

A. Supreme Court Decisions

Harris suggests that the "trilogy" of *Graham-Garner-Brower* establishes the clearly established body of law that would be necessary to deprive Scott of qualified immunity. (Brief for Respondent at 31-32.) Harris's repeated invocation of *Brower* is puzzling. There, the Court found that a seizure had been alleged where the suspect's vehicle crashed into a police roadblock: "It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock – and that he was so stopped." *Brower*, 489 U.S. at 599. *Brower* did not analyze the *reasonableness* of the seizure: "the circumstances of the roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case." *Id.* In contrast, the issue in this case is precisely one of reasonableness. *Brower* cannot clearly

establish the law on an issue the Court expressly declined to address.

Thus, Harris is left with *Graham* and *Garner* as Supreme Court cases to resolve the "clearly established" analysis. This Court has admonished that these cases are necessarily cast at a high level of generality to take account for the fact-specific nature of the inquiry and to give allowances for reasonable mistakes as to facts or law that an officer in the field may make:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.
>
> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances.

Saucier, 533 U.S. at 205; *cf. Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment."). The law governing excessive force in the context of automobile chases has not yet "emerge[d] in application over the

course of time." *Yarborough*, 541 U.S. at 664. Based on the few applications that did exist, Scott could have reasonably believed that his use of force was constitutional. *See, e.g., Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563 (11th Cir. 1992) (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam).

This Court's per curiam reversal of the denial of qualified immunity in *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) is particularly instructive. Decided after *Hope v. Pelzer*, 536 U.S. 730 (2002), *Brosseau* found no violation of clearly established law even though the officer shot a suspect from behind, whom she thought was attempting to escape in his vehicle. While Officer Brosseau suspected that Haugen would drive in a dangerous manner based on prior conduct, Scott had probable cause to believe – if not to a certainty – that Harris would continue to drive recklessly unless and until he was stopped. Scott submits that even if his use of force is deemed unconstitutional, a grant of immunity to Officer Brosseau cannot be reconciled with a denial of qualified immunity in his case.

B. Circuit Court Decisions

Harris relies primarily on three circuit cases, (Brief for Respondent at 35-37), each of which held that firing a weapon into the passenger compartment to stop a fleeing vehicle was permitted where the violator's reckless driving threatened the safety of officers and civilians. *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (passenger injured by bullet fired at fleeing vehicle); *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (driver shot in the head); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir.

1992) (driver shot and killed). All of these cases are from other jurisdictions, and none clearly established that Scott's conduct was unconstitutional. Indeed, binding precedent in Scott's own jurisdiction stated that "*Garner* [has] nothing to do with one car striking another or even with car chases in general." *Adams*, 962 F.2d at 1577 (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam). As *Adams* explained,

> [a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person. A gun is an instrument designed for the destruction of life or the infliction of injury, and death or injury *will result* if a person is struck by a bullet. While an automobile is capable of lethality, it is not designed to kill or injure; and even when automobiles strike each other, death and injury *may well not result*. . . .

Id. In contrast, the Eleventh Circuit noted that "[a] driver – even a misdemeanant – eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force." *Id.* at 1578.

The appellate panel dismissed this reasoning by finding that "the question in *Adams* – whether the striking of a car during a police chase constituted a seizure – has been unequivocally answered in the affirmative by the Supreme Court in *Brower*." (J.A. at 71 n.5.) This statement is intriguing because whether Harris was seized is not an issue in this summary judgment proceedings. And, as discussed above, *Brower* did not reach the reasonableness of the seizure that is at issue in this case, but only found a seizure had been alleged. *Adams* itself so acknowledged: "Even in *Brower*, the Supreme Court declined to hold that

the use of a deadman roadblock there was necessarily unreasonable." 962 F.2d at 1576 (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam).

Adams' facts are legally indistinguishable from the ones at bar, even if *Adams* is limited to a qualified immunity determination. Given the existence of binding circuit precedent, Scott submits that he should be accorded qualified immunity a fortiori even if his conduct is deemed unlawful. To hold otherwise would require police officers to be clairvoyant constitutional scholars and would invite second-guessing of court rulings, which would be a dangerous slope indeed. It would also support the notion that officers can substitute their interpretations of constitutional trends and thereby disregard binding court decisions. Such a flagrant disregard for the law should be discouraged by allowing officers to rely on precedent unless and until a court tells them otherwise.

C. Law Enforcement Policies

Lastly, Harris claims that "nationally recognized" law enforcement standards recognize "ramming" as appropriate when deadly force is authorized. (Brief for Respondent at 34-35.) Whether or not this statement is true, Scott's use of force in this particular case, and on these particular facts, did not violate this standard. Even then, police departments are free to adopt whatever limits they desire, and often are more restrictive than the Constitution might otherwise allow. Administrative policies and procedures do not (and cannot) define what is constitutional as a matter of law. That is the function of the courts. *United States v. Caceres*, 440 U.S. 741, 751-52

(1979) (noting that "violations of agency regulations . . . do not raise any constitutional questions").

Moreover, Scott followed the policies applicable in Coweta County. "Deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." (R. 48, Ex. 11.) Harris's law enforcement expert testified that this "judgmental policy" was in effect in the majority of jurisdictions in March 2001. (R. 37 at 54). And, as the district court found, Scott received the requisite supervisory permission to make contact with Harris's vehicle. (J.A. at 41.) Scott's adherence to departmental policy further buttresses the conclusion that he did not violate clearly established law.

D. Summary

To begin and end the qualified immunity analysis with the general statements of law, as the Eleventh Circuit has done, would effectively eliminate the application of qualified immunity to police pursuit cases, in clear violation of *Saucier*. If this Court were to determine that Scott exceeded the Fourth Amendment's standards, which Scott believes would be unwise, then *this* would be the case to establish future limitations on law enforcement activities in this precise context. Scott would necessarily be entitled to qualified immunity because the limitations were not clearly established on March 29, 2001.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ORIN S. KERR
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-4775

PHILIP W. SAVRIN
Counsel of Record
SUN S. CHOY
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000

Counsel for Petitioner

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TIMOTHY SCOTT, PETITIONER

v.

VICTOR HARRIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

JONATHAN L. MARCUS
Assistant to the Solicitor General

BARBARA L. HERWIG
TEAL LUTHY MILLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, or in what circumstances, a law enforcement officer violates the Fourth Amendment by attempting to terminate a suspect's high-speed vehicular flight by contacting the suspect's vehicle.

2. Whether, at the time of the incident, the law was clearly established that petitioner's conduct was objectively unreasonable under all the circumstances.

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In the Supreme Court of the United States

No. 05-1631

TIMOTHY SCOTT, PETITIONER

v.

VICTOR HARRIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns when a law enforcement officer's use of force to terminate a suspect's high-speed vehicular flight is excessive under the Fourth Amendment, and when law enforcement officers are entitled to qualified immunity for such measures. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 apply in civil actions against federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States also prosecutes numerous excessive-force cases under 18 U.S.C. 242, which makes it a federal crime to violate a person's constitutional rights. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. At approximately 10:45 p.m. on March 29, 2001, Clinton Reynolds, a deputy in the Coweta County, Georgia, Sheriff's Department, clocked respondent Victor Harris driving approximately 73 miles per hour in a 55 mile-per-hour zone. Pet. App. 31a. Reynolds flashed his blue lights at respondent. *Id.* at 2a. When respondent failed to stop, Reynolds activated his siren and lights. *Ibid.* Respondent then sped up and headed toward the residential and commercial districts of Peachtree City. *Id.* at 2a-3a; Pet. 4. Respondent reached speeds of at least 90 miles per hour on a windy two-lane road, repeatedly passed vehicles by crossing double yellow traffic control lines, and ran a red light. Pet. App. 2a; see Pet. 4 (respondent drove "in excess of 100 miles per hour").

Reynolds radioed dispatch that he was pursuing a fleeing vehicle and did not know the driver's identity. Pet. App. 3a. He did not inform dispatch that the underlying charge was speeding. *Ibid.* Petitioner Timothy Scott—also a deputy sheriff in Coweta County—responded with backup assistance. *Ibid.* At this time, petitioner was working on an undercover drug operation and assumed that the pursuit was in connection with that operation. R. 48, at 114-117.

Entering Peachtree City, respondent turned into a shopping center parking lot near a drug store. Reynolds and two local city police officers followed respondent as he weaved through the shopping center parking lot, while petitioner proceeded around the opposite side of the lot to block the exit. Pet. App. 3a; Pet. 4-5. As respondent approached the exit, he collided with petitioner's vehicle and then sped off onto Highway 74. Pet. App. 3a.

Respondent raced down the highway, again reaching speeds of at least 90 miles per hour, passing more cars by crossing over double yellow control lines and running an additional red light. Pet. App. 2a, 3a; Pet. 5. By this point, petitioner sought "to end the chase as soon as possible because he

felt that [respondent] was acting in a reckless and extremely dangerous manner." Pet. App. 32a. Petitioner obtained approval from his supervisor to make physical contact with respondent's vehicle in a "Precision Intervention Technique" maneuver, which is designed to cause a vehicle to spin and come safely to a stop. *Id.* at 3a-4a.[1] Because respondent was traveling at such a high speed, however, petitioner concluded that he could not execute it safely. *Id.* at 4a. He decided instead to hit respondent's rear bumper with his push bumper. *Ibid.* Petitioner made this contact when no other motorists were in the immediate area to prevent an accident with an innocent motorist. *Id.* at 32a-33a; Pet. 5-6.

After petitioner bumped respondent, respondent lost control of his vehicle. Pet. App. 4a. Respondent's vehicle left the roadway, ran down an embankment, and crashed. *Ibid.* Respondent (who had not been wearing a seatbelt (Pet. 6)) was paralyzed by injuries he suffered in the crash. Pet. App. 4a.

2. Respondent filed an action under 42 U.S.C. 1983, alleging that petitioner and others had violated his constitutional rights and seeking damages. Respondent admitted that he drove up to 90 miles per hour in a 55 mile-per-hour zone, "pass[ed] improperly," and ran a red light, see Resp. Br. in Opp. to Pet. Mot. for Summ. J. 11-12, but he argued that petitioner violated his rights under the Fourth Amendment by making contact with his car in order to stop him.

The district court denied petitioner's motion for summary judgment on the basis of qualified immunity. Pet. App. 36a-42a. The district court held that a jury could conclude that petitioner's intentional contact between his vehicle and respondent's constituted a seizure, and that petitioner's use of force—deadly or not—was not "objectively reasonable." *Id.*

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[1] Petitioner's police department had a vehicle pursuit policy which provided that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Pet. App. 23a n.2.

at 38a. "The central fact" for the court was that, at the time Deputy Reynolds "deci[ded] to instigate a high-speed chase, [respondent's] only crime was driving 73 miles per hour in a 55 miles-per-hour zone." *Ibid.* The court recognized that "[respondent] acted in an unsafe manner" during the chase, but refused to attribute much weight to that fact, because respondent "maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road." *Id.* at 39a. The court also refused to give any weight to respondent's collision with petitioner as respondent escaped from the parking lot, finding a material dispute about what happened. *Ibid.*

With respect to whether petitioner would nevertheless be entitled to qualified immunity on the ground that the violation, if any was not "clearly established," the district court concluded that "there are material issues of fact * * * which present sufficient disagreement to require submission to a jury." Pet. App. 41a-42a.

3. The court of appeals affirmed the denial of qualified immunity to petitioner. Pet. App. 5a-29a. Conducting the "two-part inquiry" set out in *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), Pet. App. 6a, the court held that, accepting respondent's allegations as true, petitioner's seizure of respondent was objectively unreasonable, and that the Fourth Amendment violation was clear at the time petitioner acted. See *Saucier*, 533 U.S. at 201 (explaining that qualified immunity turns on two-step inquiry under which a court must determine first whether "the facts alleged show the officer's conduct violated a constitutional right" and, if so, next determine "whether the right was clearly established").

The court of appeals reasoned that the case was governed by *Tennessee* v. *Garner*, 471 U.S. 1 (1985), which held unconstitutional a state statute that authorized the use of deadly force against an "unarmed, nondangerous suspect." Pet. App. 8a (quoting *Garner*, 471 U.S. at 11). The court of appeals explained that, under *Garner*, "the use of deadly force may

not be used to seize a fleeing felon 'unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Ibid.* (quoting *Garner*, 471 U.S. at 3). The court concluded that a jury could find that petitioner had used "deadly force" to stop respondent because "an automobile, like a gun, can be used deliberately to cause death or serious bodily injury." *Id.* at 10a. The court further concluded that any such use of deadly force was excessive under the circumstances because "[petitioner] did not have probable cause to believe that [respondent] had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did [respondent], prior to the chase, pose an imminent threat of serious physical harm to [petitioner] or others." *Id.* at 11a.

As for whether petitioner was nevertheless entitled to qualified immunity, the court concluded that *Garner* clearly established that petitioner's conduct was objectively unreasonable. Pet. App. 15a-16a. The court distinguished *Brosseau* v. *Haugen*, 543 U.S. 194 (2004) (per curiam), where this Court summarily reversed the denial of qualified immunity to an officer who shot a fleeing suspect after he jumped into a car to drive away from the police. The court explained that, in contrast to the situation that petitioner confronted, the officer in *Brosseau* "had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area." Pet. App. 18a. Thus, while *Garner* did not provide "fair notice" of a Fourth Amendment violation to the officer in *Brosseau*, the court reasoned, *Garner* provided such notice here. *Id.* at 19a.

The court rejected petitioner's argument that reading *Garner* as clear invalidation of his conduct was foreclosed by *Adams* v. *St. Lucie County Sheriff's Department*, 998 F.2d 923 (11th Cir. 1993) (per curiam), where the en banc court concluded that *Garner* did not clearly establish that ramming

a fleeing suspect's vehicle during a high-speed chase was an unreasonable seizure. Pet. App. 7a, 23a n.5. The court reasoned that *Adams* involved a chase that occurred before this Court's decision in *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), which held that a roadblock could constitute a Fourth Amendment seizure. Pet. App. 19a. The court recognized that *Garner* was only a "general constitutional rule," but concluded nevertheless that petitioner had "fair warning" that his conduct was unconstitutional "even though the very action in question has [not] previously been held unlawful." *Id.* at 20a (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 740-741 (2002)).

SUMMARY OF ARGUMENT

A. Petitioner did not violate respondent's Fourth Amendment rights, because the level of force he used was a reasonable response to respondent's extremely dangerous and reckless vehicular flight under the circumstances that he confronted. Respondent demonstrated his dangerousness by driving at exceptionally high speeds on a two-lane road, passing other cars by crossing over double yellow lines, running red lights, weaving through a shopping center parking lot, and continuing his flight after colliding with petitioner's vehicle. In light of the risk of serious injury or death that such conduct posed to the pursuing officers, other motorists, or pedestrians, petitioner reasonably decided to try to bring respondent's vehicle to a safe stop by bumping it from behind. The risk of harm to respondent from petitioner's conduct was proportionate to the risk of harm to the public from respondent's reckless flight.

In concluding otherwise, the court of appeals failed to follow this Court's rule that the reasonableness of force must be assessed from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). Indeed, the court relied on factors that were either wholly irrelevant or, at a minimum, not the kind of considerations that officers on

the scene could reasonably have been expected to take into account in the heat of respondent's high-speed flight, such as respondent's use of turn signals while executing illegal passing maneuvers, slowing down while running through red lights, and maintaining control of his vehicle despite driving 90 miles per hour in a 55-mile-per-hour zone. Police officers in the midst of a high-speed chase are not required to make on-the-spot judgments about whether fleeing drivers are "good" reckless drivers or bad ones before deciding what force to use to protect the public from their reckless flight. The court further erred in failing to attribute any weight either to respondent's collision with petitioner when petitioner sought to block respondent from exiting a parking lot or to respondent's decision to continue his flight in the wake of that collision.

The court also erred by minimizing the threat that respondent posed based largely on the conduct in which respondent engaged *before* the chase began. The reasonableness inquiry requires examination of the totality of the circumstances, and respondent's conduct *after* the chase began was highly relevant in gauging the threat posed by respondent to himself, police officers, other motorists, and bystanders in the commercial area where he was traveling, and to petitioner's calculus in deciding to try to stop respondent by making contact with his car. Regardless of why a driver chooses to flee police and embark upon reckless high-speed flight, he constitutes the same threat to the public behind the wheel. The grave threat posed by a suspect operating a motor vehicle in a reckless manner fundamentally distinguishes this context from the context of an officer confronting an "unarmed, nondangerous suspect," fleeing on foot. *Garner*, 471 U.S. at 11.

The court's emphasis on petitioner's ability to track down respondent at a later date was equally flawed. Under the court of appeals' approach, every law breaker in or with access to an automobile would have an incentive to flee, knowing that the Constitution prohibits the police from using force

against a suspect's car to terminate a high-speed chase. This Court has rejected such an approach to Section 1983 liability for alleged substantive due process violations, see *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), and it should do so here as well. If the suspect's conduct in fleeing from the police itself presents an immediate danger to public safety—as a suspect's attempt to elude the police at high speeds while behind the wheel of a motor vehicle invariably will—the Constitution affords police the latitude to use force against the suspect to attempt to neutralize that danger so long as the level of force is proportionate to the threat.

B. Even if the level of force petitioner used to stop respondent violated the Fourth Amendment, petitioner is nevertheless entitled to qualified immunity because, at the time petitioner acted, the law did not put him on notice that his conduct was constitutionally unreasonable. Excessive force claims are heavily fact dependent. As a result, in the context of excessive force claims, this Court has made clear that an officer who stands accused of using constitutionally excessive force is entitled to qualified immunity unless the alleged violation was established in the "particularized" sense that a reasonable officer would have understood that his actions violated the law in the specific "situation he confronted." *Brousseau*, 543 U.S. at 199; *Saucier*, 533 U.S. at 202.

Brosseau and *Saucier* control this case and make clear that the court of appeals erred in relying on the general principle, established in *Garner*, that deadly force cannot be used to stop the flight of an unarmed, nondangerous suspect. Indeed, *Brosseau* summarily reversed a Ninth Circuit decision that had held, just as the court of appeals did here, that *Garner* clearly established that deadly force cannot be used to stop vehicular flight. *Brosseau* presented a much closer parallel to *Garner* in that at least the force used—a gunshot—was the same as in *Garner*. This case is distinct from *Garner* in both the means of flight (by car, rather than on foot) and the force used (using a police vehicle to stop the

fleeing vehicle, rather than a gunshot to the person). Nonetheless, *Brosseau* emphasized that both *Garner* and the more general rule of *Graham* informed the analysis and explained that cases involving the use of force to terminate vehicular flight do not lend themselves to a categorical rule; rather "the result depends very much on the facts of each case." 543 U.S. at 201.

The case with facts most analogous to those here did not give petitioner notice that his conduct was unlawful. To the contrary, in *Adams* v. *St. Lucie County Sheriff's Department*, the Eleventh Circuit observed that it was "doubtful" that an officer's ramming a suspect's car during a high-speed chase to halt the suspect's flight was excessive force and held that *Garner* did not provide a clear answer to the question. 962 F.2d 1563, 1577-1578 & n.6 (1992) (Edmonson, J., dissenting), adopted by the court en banc, 998 F.2d 923 (1993) (per curiam). Neither respondent nor the court of appeals pointed to any case holding otherwise, and many other decisions have upheld the use of even deadly force to stop reckless and dangerous vehicular flight. In these circumstances, any mistake on petitioner's part in concluding that respondent's conduct justified the level of force he used was undoubtedly reasonable. The court of appeals therefore erred in refusing to accord petitioner qualified immunity.

ARGUMENT

PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY FROM RESPONDENT'S "EXCESSIVE FORCE" CLAIM

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The doctrine "exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (2001) (per

curiam) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). Qualified immunity thus provides "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). The doctrine is particularly important in protecting the decisions of law enforcement officers who must make heat-of-the-moment judgments in response to complex and unfolding threats.

The qualified immunity defense has two steps. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). First, a court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Ibid.* Second, if such a violation exists, the court must decide whether that right was "clearly established" at the time the officer acted such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. It is not enough for the plaintiff to identify some generalized constitutional right, such as the Fourth Amendment right to be free from the excessive use of force, that was established at the time of the relevant conduct. *Id.* at 201-202. As explained below, respondent's excessive force claim fails on both of these independent inquiries, and petitioner therefore is entitled to qualified immunity from suit.

A. The Force Used By Petitioner To Terminate Respondent's Vehicular Flight Was Reasonable, And Therefore Constitutional, Under The Circumstances

1. The legal standard for "excessive force" claims

In *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), this Court held "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." The Court explained that "[d]etermining

whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks and citation omitted).

In *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.* at 11. There, an officer shot and killed an unarmed suspect fleeing on foot from the site of a burglary. While the Court invalidated a Tennessee statute to the extent that it authorized the officer's use of deadly force against an "unarmed, nondangerous suspect," the Court made clear at the same time that the officer's conduct would have been reasonable had he "ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others." *Ibid.*

In *Graham*, the Court explained that *Garner* reflected application of the Fourth Amendment's traditional "totality of the circumstances" test to the use of deadly force to seize an unarmed and nondangerous suspect. See 490 U.S. at 396 (citing *Garner* for the proposition that "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure'"). Consistent with that understanding, the *Graham* Court emphasized that the Fourth Amendment reasonableness inquiry is highly fact-specific, "requir[ing] careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Ibid.* Moreover, in *Brosseau*, 543 U.S. at 198-199, although the Court expressly declined to reach the underlying Fourth Amendment question, it indicated that both *Graham* and *Garner* were relevant (even though *Brosseau* provided a clearer parallel with *Gar-*

ner than this case) and that the totality of the circumstances were relevant.

In determining whether an officer used unreasonable force, courts must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. That perspective, the Court observed, is necessary to "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-397. The inquiry into reasonableness is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. A claim that a police officer used excessive force—deadly or not—in stopping a suspect's vehicular flight thus is governed by the Fourth Amendment's objective reasonableness standard and must be carefully evaluated from the officer's perspective and in light of all the surrounding circumstances that he faced.

2. Petitioner's use of force was not excessive

Petitioner's conduct was objectively reasonable in light of the facts and circumstances he confronted on the night of the high-speed chase precipitated by respondent.

a. At the moment petitioner decided to try to bring respondent's vehicle to a stop by hitting respondent's rear bumper with the push bumper of his vehicle, an officer in petitioner's position would have reasonably believed that respondent presented a substantial risk of serious injury or death to petitioner and others and that stopping respondent was necessary to prevent such harm and his escape. Respondent demonstrated his dangerousness in at least two separate ways.

First, respondent drove extremely recklessly. He reached speeds up to or exceeding 90 miles per hour on a windy two-lane highway (while numerous other cars were on the road),

crossed the double yellow line to pass cars, ran two red lights, swerved through a shopping center parking lot, and collided with petitioner's vehicle.[2] Respondent's reckless driving gave an officer in petitioner's position ample reason to conclude that respondent posed a substantial risk of serious injury or death to other motorists (or bystanders) who came into his path unless or until his flight was arrested. Respondent's willingness to lead police officers on a high-speed chase provided little prospect that respondent would cease his reckless flight absent successful escape, loss of control of respondent's own car, or direct intervention by the police. An officer could have also concluded that he had probable cause to believe that respondent's high-speed flight was both criminal and involved the threatened infliction of serious physical harm.[3]

Second, respondent struck petitioner's vehicle after petitioner had attempted to block respondent's exit from the shopping center parking lot and continued his flight. Judged from the perspective of the officer on the scene, a collision that facilitates or does not deter flight strongly suggests that the fleeing suspect presents a risk of serious harm, because it demonstrates that respondent had no intention of stopping, regardless of the obstacles lying or placed in his path. See *Garrett* v. *Athens-Clarke County*, 378 F.3d 1274, 1276-1281 (11th Cir. 2004) (per curiam) (fettering suspect (who died) by tying his wrists to his ankles and spraying him with pepper

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[2] Although there is some dispute over the specifics of the collision, and the facts must be evaluated in the light most favorable to respondent at this juncture, there is no dispute that a collision occurred. In addition, although the court of appeals stated that "the roads were mostly empty," Pet. App. 11a, the videotapes show otherwise.

[3] Respondent violated numerous laws, including Ga. Code Ann. § 40-6-181 (2004) (speeding) ; *id.* § 40-6-390 (reckless driving); *id.* § 40-6-395 (fleeing police officer); *id.* § 16-10-24 (2003) (obstruction of officers) , and potentially violated others, including Ga. Code Ann. § 16-5-21 (aggravated assault); *id.* § 16-7-22 or § 16-7-23 (criminal damage to property); *id.* § 16-7-24 (criminal interference with government property).

spray was not unreasonable because suspect—who had led officers on high-speed chase, continued driving after an officer had bumped his vehicle, struck an officer's vehicle, and wrestled with an officer—"ha[d] shown that he ha[d] every intention of fighting and forcibly escaping arrest"); *Smith* v. *Freeland*, 954 F.2d 343, 344-347 (6th Cir.) (shooting and killing fleeing suspect was not unreasonable because the suspect, who had exceeded 90 miles per hour during chase, struck officer's vehicle, and escaped officer's blockades, "had proven he would do almost anything to avoid capture"), cert. denied, 504 U.S. 915 (1992).

Because respondent's conduct presented a clear and immediate danger to public safety, and because respondent had demonstrated that he had no intention of ceasing that conduct, petitioner was justified in concluding that it was appropriate to take the step of contacting respondent's car from behind with his push bumper in an effort safely to stop respondent's dangerous flight. See *Adams* v. *St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1577-1578 (11th Cir. 1992) (Edmonson, J., dissenting) (observing that "it is doubtful that [the officer's repeated ramming of the fleeing suspect's vehicle] in this case was constitutionally excessive" because "[a] driver—even a misdemeanant—eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force"), adopted by the court en banc, 998 F.2d 923 (1993) (per curiam).

b. In reaching the contrary conclusion, the court of appeals erred in multiple ways.

First, the court of appeals erred by evaluating the reasonableness of petitioner's conduct solely by reference to *Garner*. In doing so, the court failed to follow the Court's more recent precedents in *Graham* and *Brosseau*, which made clear that *Garner* was merely an application of the Fourth Amendment reasonableness test to the facts that were specifically presented there. 490 U.S. at 395-396; 543 U.S. at 197.

The court of appeals concluded that petitioner used deadly

force, Pet. App. 11a, and thus placed petitioner in *Garner*'s box. *Garner*, however, especially in light of *Graham* and *Brosseau*, should not be read to adopt a single bright-line rule for all uses of potentially deadly force. *Brosseau* suggests that differences in the form of flight inform the Fourth Amendment calculus. Differences in the force used are at least as relevant, and bumping the suspect's car from behind, even at a high rate of speed, is not the equivalent to pointing a gun at the suspect and shooting him. An accurate gunshot is certain to cause serious injury or death to the suspect, whereas bumping the suspect's car from behind is not. As the Eleventh Circuit itself has observed, "[a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams*, 962 F.2d at 1577. On this basis alone, *Garner*, while relevant, is not entitled to the controlling weight attributed to it by the court of appeals.[4]

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[4] The United States Department of Justice has as a policy matter defined "deadly force" as "the use of any force that is likely to cause death or serious physical injury." *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations* pt. II (visited Dec. 12, 2006) <http://www.usdoj.gov/ag/readingroom/resolution14c.htm> (*Commentary*). The Department's policy statement provides that "[d]eadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person." U.S. Dep't of Justice, *Policy Statement, Use of Deadly Force* pt. I(A) (visited Dec. 12, 2006) <http://www.usdoj.gov/ag/readingroom/resolution14b.htm> The policy addresses the firing of weapons at the occupants of motor vehicles or to otherwise disable motor vehicles, see pt. V, but it does not address the use of means other than firearms to terminate vehicular flight. Moreover, the Commentary to the policy notes that "the Department deliberately did not formulate this policy to authorize force up to constitutional or other legal limits." *Commentary* pt. I. In addition, the Commentary emphasized that "[t]he reasonableness of a belief or decision must be viewed from the perspective of the officer on the scene, who may often be forced to make split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving." *Id.* pt. II.

Because (quite unlike the firing of a gun) the use of a vehicle to stop a fleeing suspect may not amount to deadly force in any number of circumstances, the Fourth Amendment reasonableness inquiry in this context should be conducted under the totality-of-the-circumstances inquiry applied in *Graham*. That inquiry may account for the fact that some uses of a vehicle may present a greater risk of injury or even death than others, but also is faithful to the Court's repeated insistence that, to ensure that the Constitution provides officers the latitude they need to do their jobs effectively, the inquiry into the reasonableness of the officer's conduct be fact-intensive and take into account the totality of the circumstances. See *Graham*, 490 U.S. at 396.

Moreover, *Garner* addressed the situation where an officer meets "an unarmed, nondangerous suspect." 471 U.S. at 11; see *id.* at 10 (focusing on "nonviolent suspects"). By definition, vehicle flight cases are fundamentally different, as *Brosseau* appears to recognize. A vehicle poses a potentially deadly risk to others, and a suspect operating a vehicle in a reckless fashion is thus always dangerous, independent of the seriousness of the underlying crime that led to the attempted stop and the ensuing flight. Accordingly, regardless of whether vehicle-to-vehicle contact may constitute deadly force, the inquiry discussed in *Garner* is doctrinally unfit for the vehicle-flight context.[5]

Second, the court erred by failing to apply *Graham*'s reasonable-officer-on-the-scene standard. *Graham*, 490 U.S. at 396-397. The court held that a reasonable jury could conclude that petitioner lacked probable cause to believe that respondent posed a threat of serious physical harm to the

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[5] Even assuming that bumping a suspect's car constitutes deadly force, and that the *Garner* standard applies, petitioner did not use excessive force under the circumstances here. Petitioner had probable cause to believe that respondent posed a potentially grave threat to the public given the reckless manner in which he operated his vehicle and his refusal to comply with petitioner's efforts to prevent his escape.

officers who were chasing him or to other motorists or pedestrians. The court observed that "the roads were mostly empty and [respondent] remained in control of his vehicle." Pet. App. 11a. Those observations reflect application of precisely the type of 20/20 hindsight that *Graham* deemed improper.

It is undisputed that the officers observed respondent driving at least 90 miles per hour in a 55 mile-per-hour zone, passing vehicles on a two-lane road by crossing over double yellow traffic control lines, running through red lights, and driving through a shopping center. In the heat of a high-speed chase, the officers conducting the pursuit cannot be expected to count the number of vehicles on the roads (beyond those respondent passed by crossing the double yellow lines), pay attention to whether the suspect is using his turn signal when passing vehicles illegally (not a highly relevant consideration under the circumstances), or evaluate whether the precise speed at which the suspect drove through red lights mitigated the dangers that conduct inherently presents.

Moreover, even assuming respondent "remained in control" while driving recklessly, he still presented a serious risk to other vehicles or pedestrians, because anyone driving 90 miles per hour can lose control at any moment and does not have sufficient time to react to unpredictable events, because using turn signals to pass by crossing the double yellow line does not provide any protection to oncoming traffic, and running red lights presents a high risk to crossing traffic regardless of the precise speed at which the violation is accomplished. Thus, in the heat of the moment, police officers do not have to determine whether a suspect is a "good" reckless driver where, as here, reckless driving itself clearly poses a substantial risk to the public.

The court of appeals relied on the fact that, at the time petitioner bumped respondent, police blockades had cleared "the motorway * * * of motorists and pedestrians." Pet. App. 13a. But there is no evidence that petitioner was aware of the extent of the blockades such that he would have known

how far ahead of respondent the police had sealed off all roadways. Especially in light of respondent's escape from the shopping center parking lot exit blocked by petitioner's vehicle and the fact that the chase already had covered approximately nine miles, the police would have had to seal off an exceptionally large area to ensure that respondent would not run into another vehicle (or pedestrian). Moreover, rather than detracting from the reasonableness of petitioner's conduct, that the stretch of highway on which petitioner decided to bump respondent's vehicle had been cleared of traffic buttresses the reasonableness of his action, because it provides contemporaneous evidence that respondent's driving posed risks and it demonstrates that the police acted to minimize the risks posed to innocent persons.

Third, the court erred by refusing to attribute any weight to the collision in the parking lot on the ground that there was a material dispute regarding precisely what happened. As explained above, no matter who hit whom or whether or not respondent could have avoided the collision when petitioner sought to block the exit, there is no dispute that a collision occurred. A reasonable officer in petitioner's position would have concluded from respondent's refusal to stop—either before or after colliding with petitioner's vehicle—that respondent posed a substantial threat to public safety and that blocking his path would not be sufficient to stop him. See *Smith*, 954 F.2d at 347 ("[The pursuing officer] could reasonably believe that [the suspect] could escape the roadblock, as he had escaped several times previously.").

Fourth, the court of appeals erred by basing its determination that petitioner's conduct was unreasonable largely on what respondent had done to prompt the high-speed chase. Pet. App. 11a (emphasizing that respondent's infraction was speeding and that respondent, "*prior to the chase*, [did not] pose an imminent threat of serious physical harm to [petitioner] or others") (emphasis added). Under *Graham*, "the severity of the crime at issue" is only one of several factors

that courts should consider in evaluating the reasonableness of the officer's response. 490 U.S. at 396. That factor may have more weight when the means of attempted escape present no risk, as in the unarmed, nondangerous suspect fleeing on foot in *Garner*. But when the means of escape pose serious risks—as in the case of an armed suspect brandishing a weapon or a suspect fleeing at high-speed in a vehicle—the seriousness of the underlying offense is less relevant. Indeed, in many cases the courts of appeals have upheld the use of deadly force to terminate a high-speed chase that began after the observation of traffic violations. See *Pace* v. *Capobianco*, 283 F.3d 1275, 1276, 1281-1282 (11th Cir. 2002) (holding constitutionally reasonable the shooting and killing of a fleeing suspect who was initially pulled over for driving without his headlights on); *Scott* v. *Clay County*, 205 F.3d 867, 871, 876-879 (6th Cir.) (holding constitutionally reasonable the shooting of a passenger in the vehicle of a fleeing suspect who was initially observed driving "erratically"), cert. denied, 531 U.S. 874 (2000); *Cole* v. *Bone*, 993 F.2d 1328, 1330, 1333-1334 (8th Cir. 1993) (holding constitutionally reasonable the shooting and killing of a fleeing suspect who was initially observed failing to pay a toll); *Smith*, 954 F.2d at 344, 346-348 (holding constitutionally reasonable the shooting and killing of a fleeing suspect who was initially observed running a stop sign).[6]

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[6] As a policy matter, some federal law enforcement components have decided to limit the circumstances in which vehicle pursuits of suspects are allowed. For example, the policy adopted by the United States Park Police provides that pursuit of a vehicle is authorized in three circumstances: (1) " the offense for which the suspect is being pursued" is a felony (but "[t]he act of fleeing and eluding the police shall not in itself be a pursuable offense") ; (2) "[t]he suspect presents a clear and immediate threat to public safety if not immediately apprehended"; or (3) the suspect has committed "[t]raffic violation(s) on limited access highways within primary [Park Police] jurisdiction." U.S. Park Police Gen. Order § 2205.01. The policy further provides that "[a]n officer shall not use his/her vehicle to strike or ram a suspect's vehicle with the intent of solely disabling the vehicle, unless he/she has been specifically trained in techniques that attempt to minimize danger to himself/herself

While the nature of the underlying offense remains relevant, when the circumstances of a suspect's flight create substantial risks, those circumstances are highly relevant to assessing the level of force that is appropriate to stop him. See *Graham*, 490 U.S. at 396 (courts should consider "whether the suspect poses an immediate threat to the safety of the officers or others" and whether the suspect "is actively resisting arrest or attempting to evade arrest by flight"). Regardless of what respondent did before he fled, the reckless manner in which he operated his vehicle therefore justified the use of force to terminate his flight.[7]

Because petitioner could have reasonably believed based on the totality of the circumstances that respondent was putting lives in danger by the reckless manner in which he was fleeing, the level of force that he employed was reasonable and commensurate to the threat respondent posed to public safety. See, *e.g.*, *Garrett*, 378 F.3d at 1280 (use of force that resulted in fleeing suspect's death was reasonable where suspect "repeatedly placed officers' lives and innocents' lives in danger by engaging the police in a multi-county chase that did not end until [the suspect] had crashed twice") (emphasis omitted); *Pace*, 283 F.3d at 1277, 1281 (fatal shooting was objectively reasonable where fleeing suspect led police on

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and others when making deliberate contact between vehicles." *Id.* § 2205.04(A)(11). Another example is the National Park Service (NPS) Manual, which governs the conduct of NPS rangers. It provides that "[d]eliberate contact between vehicles, forcing the pursued vehicle off the roadway, or ramming the pursued vehicle while it is in motion, are prohibited unless other reasonable alternatives have been exhausted." NPS, *RM-9, Law Enforcement Reference Manual* chap. 7-3, § 3.2.1 (May 2000). These policies, however, do not alter the constitutional standard of reasonableness, which takes into account all of the circumstances.

[7] The very fact of respondent's flight and his refusal to stop when his vehicle was blocked in the shopping center parking lot gave petitioner grounds to suspect that respondent had something to hide from law enforcement. See *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000).

high-speed chase, turned in front of an officer, swerved at officers coming from opposite direction, almost hit a motorist head-on, and drove 50 to 60 miles per hour through private property); *Scott*, 205 F.3d at 872, 876-878 (shooting was objectively reasonable where fleeing car drove 85 to 100 miles per hour, narrowly missed unmarked police cruiser, crashed into a guardrail, and attempted to resume flight by accelerating into officer's path); *Cole*, 993 F.2d at 1330-1333 (fatal shooting was objectively reasonable where suspect driving truck exceeded 90 miles per hour, sped past road blocks, continued flight after one of the truck's tires was shot out, reportedly attempted to ram police cars, and ran motorists off the road); *Smith*, 954 F.2d at 347-348 (fatal shooting was objectively reasonable where the fleeing suspect "posed a significant threat to others" because he had driven recklessly and at high speed and had escaped police roadblocks).

Finally, the court of appeals' reliance on the prospect of a subsequent arrest to require officers to abandon a chase when the suspect is bent on escape gives law breakers a perverse incentive to step on the accelerator and resist an arrest or a show of authority. As Justice Kennedy observed in *County of Sacramento* v. *Lewis*, "[t]here is a real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often." 523 U.S. 833, 858 (1998) (concurring opinion); see *id.* at 865 (Scalia, J., concurring in the judgment).

The court of appeals' decision creates a perverse and dangerous regime in which police officers are effectively required to let suspects fleeing by vehicles escape, even when they reasonably believe that their continued flight presents serious risks to others. Moreover, there is no reason to assume that a suspect who recklessly flees the police in his car will suddenly become a model driver once he no longer sees a squad

car's lights in his rear-view mirror. Indeed, the suspect in that situation is more likely to assume that more police are waiting ahead and thus continue to drive in a reckless fashion in an effort to avoid capture.

c. Law enforcement agencies may reasonably reach different conclusions about whether, and in what circumstances, to authorize officers in the field to engage in high-speed vehicle pursuit of fleeing suspects, and when to permit officers to terminate such flight by vehicle-to-vehicle contact. But this Court need not constitutionalize that policy difference. Under the Fourth Amendment, the ultimate determination whether an officer who uses his vehicle in an effort to terminate a high-speed chase uses excessive force must be made in view of all the surrounding circumstances. The court of appeals in this case erred in concluding that petitioner's conduct was objectively unreasonable under the circumstances of respondent's high-speed vehicular flight.

B. In Any Event, Petitioner's Use Of Force Did Not Violate Any Clearly Established Right

Even assuming petitioner's conduct was objectively unreasonable, he is entitled to qualified immunity because he did not violate any clearly established right.

1. The law is not clearly established unless it provides the officer notice that his conduct is unlawful in the specific situation he confronts

"Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Will* v. *Hallock*, 126 S. Ct. 952, 959 (2006). In determining whether "the law on point" was clear, this Court has repeatedly emphasized that the relevant "law" is the law applicable in "the specific context of the case, not as

a broad general proposition." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201). Thus, the law must provide an officer clear notice "that his conduct was unlawful *in the situation he confronted*." *Id.* at 199 (quoting *Saucier*, 533 U.S. at 202) (emphasis added).

In *Brosseau*, this Court summarily reversed the denial of qualified immunity to an officer sued for a Fourth Amendment violation under Section 1983 for shooting a suspected felon as he attempted to flee in a vehicle. 543 U.S. at 201. The Ninth Circuit in that case had reasoned that *Garner* made clear that the officer's decision to shoot the suspect to prevent his vehicular flight was constitutionally unreasonable, because the suspect had not posed a sufficiently serious threat. *Haugen* v. *Brosseau*, 339 F.3d 857, 874 (2003).

This Court rejected the Ninth Circuit's approach, holding that it reflected a "clear misapprehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3. The Court explained that "this area [involving the use of deadly force to stop vehicular flight] is one in which the result depends very much on the facts of each case," *id.* at 201, such that "*Garner* alone [cannot] offer a basis for decision," *id.* at 199. Instead, the Court looked for law specifically governing "the 'situation [the officer] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200 (quoting *Saucier*, 533 U.S. at 202).

The Court then discussed three out-of-circuit cases to which the parties had pointed, two of which had found no constitutional violation in the use of deadly force to terminate a high-speed chase. *Brosseau*, 543 U.S. at 200 (citing *Cole* and *Smith*). The Court concluded that "[t]he cases by no means 'clearly establish' that [the officer's] conduct violated the Fourth Amendment," but rather "suggest that [her] actions fell in the hazy border between excessive and acceptable force." *Id.* at 201 (internal quotation marks and citation omitted). See *Saucier*, 533 U.S. at 209 (qualified immunity appro-

priate where plaintiff failed to "identif[y] any case demonstrating a clearly established rule prohibiting the officer from acting as he did").

In *Brosseau*, the Court further observed that excessive force claims by their nature do not lend themselves to general rules. Rather, as the Court put it, "this area is one in which the result depends very much on the facts of each case." 543 U.S. at 201. The nature of excessive force claims thus makes it especially difficult for a plaintiff to show that prior case law put a defendant on notice that his conduct would be unlawful in the particular circumstances he confronted.

2. The court of appeals erred in holding that the law provided petitioner notice that his use of force was excessive

The court of appeals here rejected petitioner's qualified immunity defense on the very ground on which the Ninth Circuit had relied in *Brosseau*, namely, that *Garner* made clear that petitioner's conduct was objectively unreasonable. Pet. App. 15a. That analysis is flawed, *a fortiori*, because *Garner* is closer to *Brosseau* than it is to this case.

Garner is "cast at a high level of generality." *Brosseau*, 543 U.S. at 199. It did not provide notice to petitioner—in the specific situation he confronted—that his conduct was unlawful. To the contrary, *Garner* involved an unarmed and nondangerous suspect fleeing *on foot* who posed none of the same risks as a 3000-pound vehicle traveling at least 90 miles per hour and crossing double yellow lines on a two-lane road. Indeed, the officer in *Garner* did not even claim that the suspect posed an immediate threat to anyone, testifying only that he shot the suspect to prevent him from "get[ting] away." *Garner*, 471 U.S. at 4 n.3. *Garner* thus provides no guidance, much less clear guidance, to an officer confronted with a suspect using a vehicle in a reckless manner to escape apprehension. Cf. *Donovan* v. *City of Milwaukee*, 17 F.3d 944, 952 (7th Cir. 1994) ("[T]he facts of *Garner* are not sufficiently particu-

larized to put potential defendants on notice that striking a fleeing vehicle with their police cruisers constitutes an unreasonable seizure."). *Brosseau* made that much clear by refusing to find *Garner* controlling even though the force—a gunshot—was identical. Rather, *Brosseau* indicates that the differences in the means of flight render *Garner* inapposite. Here, both the force used (car bumper, as opposed to a gun) and the demonstrably reckless vehicular flight distinguish this case from *Garner* and make qualified immunity even more obviously appropriate than in *Brosseau*.

The court of appeals' earlier decision in *Adams* underscores its error in finding that petitioner had notice that his conduct was unlawful. There, in a case with facts closer to those here than those in any other decision cited by the court of appeals, the Eleventh Circuit sitting en banc reversed the district court's judgment denying qualified immunity to officers who "intentionally rammed the [suspect's] automobile several times" in an effort to force the fleeing suspect's vehicle off the road. *Adams*, 962 F.2d at 1565. The last contact between the vehicles caused the suspect to lose control and crash, killing his passenger. *Ibid.* The en banc court concluded that the officers were entitled to qualified immunity on several grounds. See *Adams*, 998 F.2d at 923 (adopting "the reasoning set out in the dissenting opinion of Judge Edmondson," 962 F.2d at 1573-1579).

In particular, the *Adams* court held that, even if the law in 1985 did clearly establish the seizure, the officers "were due qualified immunity" because the law did not clearly establish that the seizure was unreasonable. 962 F.2d at 1576. In so ruling, the court rejected the plaintiff's contention that *Garner* clearly established that point. The court explained that "[a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Id.* at 1577. The court elaborated that, "[e]ven if a policeman knew that he could not use 'deadly force' to stop a misdemeanant who was fleeing in a car, * * * a reasonable

policeman would [not] necessarily know that hitting the fleeing car was just like shooting a person: a use of deadly force per se—that is, force almost certain to cause death or great bodily harm (not just capable of it)." *Ibid.* See *id.* at 1577 n.6 ("*Garner* did not settle much except what *Garner*, itself, plainly decided given *Garner*'s facts."). The court further observed that, while it was unnecessary for it to decide whether the force used was in fact excessive, "it is doubtful that the alleged level of force in this case was constitutionally excessive" because "[a] driver—even a misdemeanant— eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force." *Id.* at 1577-1578.

Adams was a controlling decision from petitioner's own jurisdiction. At the time he acted, it would have provided more direct guidance to him than any other decision. The court of appeals dismissed petitioner's reliance on *Adams* on the ground that the incident in *Adams* occurred before this Court decided *Brower* v. *County of Inyo*, 489 U.S. 593 (1989).[8] Pet. App. 19a. The *Adams* court, however, did not limit itself to the question whether the ramming of the suspect's vehicle constituted a seizure triggering Fourth Amendment analysis; it squarely addressed whether *Garner* clearly established that the ramming was unlawful, assuming that there *was* a seizure. See *Donovan*, 17 F.3d at 952 (agreeing with *Adams* that "*Garner* is not the appropriate starting point for our analysis [of the law applicable to police seizures of fleeing vehicles] because *Garner*'s facts are too different").

In light of *Adams*, the court of appeals' error in this case is even more egregious than the Ninth Circuit's error in *Brosseau*. In *Brosseau*, the Court held that the Ninth Circuit

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[8] In *Brower*, this Court held that a suspect who led the police on a high-speed chase and was killed when he crashed into a roadblock stated a claim for relief under Section 1983 to the extent he alleged that "the roadblock [was set up] in such manner as to be likely to kill him." 489 U.S. at 599. That conclusion sheds no light on whether petitioner's conduct in this case was unreasonable, much less establishes that it was.

had erred in relying on out-of-circuit cases that did not "squarely govern" the specific situation that the defendant confronted and, instead, simply suggested that her conduct "fell in the hazy border between excessive and acceptable force." 543 U.S. at 201 (quoting *Saucier*, 533 U.S. at 206). In this case, the court of appeals not only failed to identify a precedent that "squarely" held that petitioner's actions crossed the line of acceptable force, but it also overlooked an en banc decision expressly indicating that it was "doubtful" that such conduct was unconstitutionally excessive and that had concluded that *Garner* did *not* provide clear guidance in the situation petitioner confronted.

Moreover, even apart from *Adams*, many decisions had held that the use of deadly force was justified as a means to terminate a high-speed chase. See *Scott*, *supra*; *Cole*, *supra*; *Smith*, *supra*. While the court of appeals attempted to distinguish *Cole* and *Smith* on the ground that the suspects' driving conduct in those cases was more extreme, see Pet. App. 28a n.15, the officers' use of force (shooting the suspects) in those cases was more extreme as well. In any event, at a minimum, those cases "undoubtedly show that this area is one in which the result depends very much on the facts of each case." *Brosseau*, 543 U.S. at 201. And the court of appeals pointed to no case with facts that would have put petitioner on notice that his conduct was unconstitutional in the specific circumstances he confronted. Given the state of the law on vehicular flight at the time petitioner acted, the court of appeals' holding that petitioner's alleged mistake of law was constitutionally unreasonable is untenable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

JONATHAN L. MARCUS
Assistant to the Solicitor General

BARBARA L. HERWIG
TEAL LUTHY MILLER
Attorneys

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IN THE

Supreme Court of the United States

TIMOTHY SCOTT, a Coweta County, Georgia, Deputy,
Petitioner,

v.

VICTOR HARRIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF GEORGIA AS *AMICI CURIAE* SUPPORTING RESPONDENT

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FDN.
125 Broad Street
New York, NY 10004
(212) 549-2611

GERALD R. WEBER
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA
75 Piedmont Avenue,
Suite 514
Atlanta, GA 20202
(404) 523-6201

HAMILTON P. FOX, III *
BRIAN C. SPAHN
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
(202) 383-0100

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF GEORGIA AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union is a nonprofit and nonpartisan organization of more than 550,000 members nationwide. The ACLU of Georgia is one of its statewide affiliates. As part of its mission, the ACLU seeks to preserve each citizen's right to due process and to fair treatment by the government whenever the loss of liberty or property is at

[1] Pursuant to Rule 37.6, the ACLU states that no counsel for a party authored this brief in whole or in part and that no person other than the ACLU, its members, and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

stake. This case raises several important issues related to the qualified immunity defense in constitutional tort actions. One issue, and the principal focus of Respondent's brief, is whether qualified immunity was properly denied on the record as it now stands. A second, threshold issue is whether the district court decision denying Petitioner's motion for summary judgment on qualified immunity grounds was properly subject to immediate appeal. That jurisdictional question has broad practical significance. Too often, and for too many plaintiffs, the cost and delay associated with an appeal of an order denying qualified immunity can effectively undermine enforcement of the civil rights laws. Respondent, for example, has not had his day in court for nearly six years since the night he was injured, and his plight is not unusual. The ACLU therefore submits this brief on the jurisdictional issue to assist the Court in its resolution of this case.

STATEMENT

On March 29, 2001, at approximately 10:42 p.m., Deputy Clinton Reynolds of the Coweta County, Georgia Sheriff's Office clocked Respondent Victor Harris's car traveling 73 miles per hour in a 55 miles-per-hour zone. (J.App. at 11).[2] From this point forward, some of the crucial facts are in dispute. Scott claims that Harris picked up speed when Reynolds flashed his lights. (*Id.*) Harris denies that he increased his speed after seeing Reynold's blue lights. (J.App. at 11-12). Reynolds made the decision to stop Harris and charge him with a speeding violation. (*Id.*) Once in pursuit, Reynolds broadcast Harris's tag number to his dispatcher. (J.App. at 17). Reynolds did not broadcast any information concerning the underlying charge that precipitated the pursuit. (J.App. at 17-18). Coweta County Deputy,

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[2] Where appropriate throughout this brief, *amici* cite to the Joint Appendix filed in this Court by Petitioner on December 13, 2006 indicated by "J.App.". Citations to the record are indicated by the letter "R.".

Timothy Scott, heard Reynold's broadcast and joined the pursuit. (*Id.*)

Harris claims that Scott did not know of or request information pertaining to the underlying basis for the pursuit until the pursuit concluded. (*Id.*) However, Scott asserts in his brief to this Court that he assumed (incorrectly) that the pursuit was part of an undercover narcotics operation. (Brief for Petitioner at 3.) After entering Peachtree City, in Fayette County, Georgia, Harris claims that he slowed his car, turned on his blinker and entered into an empty drug store parking lot. (J.App. at 21). Scott asserts that Harris was driving recklessly and that he veered into the parking lot. (Brief for Petitioner at 3.) After missing the entrance, Scott drove his car around the parking lot and attempted to block Harris from exiting by driving directly into the path of Harris's car. (J.App. at 20-21). When he realized that Scott was in his path, Harris attempted to turn left to avoid hitting Scott, but their cars came into contact with each other, causing minor damage to Scott's cruiser. (J.App. at 22-23). Scott contends that Harris was boxed in and deliberately collided with Scott's cruiser in an attempt to escape. (J.App. at 22).

Harris, followed by Scott and Reynolds, left the parking lot. The Peachtree Police Department blocked the intersections of the subsequent pursuit route. (J.App. at 23). Scott was now driving the lead pursuit car. (J.App. at 28-29). He requested permission via radio to use a Precision Intervention Technique maneuver ("PIT"). (J.App. at 24-25). Scott claims that he was familiar with the PIT maneuver by talking with fellow Coweta County Deputy Sheriffs who had received proper training. (R. 49 at 137-41). However, Harris denies that Scott had any high-speed pursuit training. (J.App. at 25). After receiving approval to "take out" Harris, Scott decided instead to ram Harris's bumper because the speed was too fast for the PIT technique to be used. (J.App. at 26, 28-30). As a result of being rammed by Scott, Harris's car

left the road and crashed into an embankment. (J.App. at 29-30). Scott is now a quadriplegic as a result of injuries suffered in the crash. (J.App. at 41-42).

Harris filed this action asserting that Scott used excessive force to apprehend him in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution. (R. 1). Scott filed a Motion for Summary Judgment asserting qualified immunity. (R. 36). The district court denied summary judgment, holding that genuine issues of material fact existed. (J.App. at 38-64). Based on these unresolved factual disputes, and viewing the evidence in a light most favorable to Harris as the non-moving party, the district court ruled:

> [T]hat a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force. (J.App. at 47).
>
> A rational fact finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others. The record does not reflect that he had menaced or was likely to menace others. (*Id.* at 48).
>
> [T]he record reflects that [Harris] maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road. (*Id.*)
>
> Viewing the facts in Harris's favor ... it appears that either Scott hit Harris [in the parking lot], or that the crash was an accident. (*Id.*)
>
> Under this version of the facts, a fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force—ramming the car while traveling at

> high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. . . . Thus, a fact issue remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris. (*Id.* at 49).
>
> Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury. (*Id.* at 50-51).

The Eleventh Circuit affirmed the district court's ruling with respect to Scott, holding that a reasonable jury could find that Scott violated Harris's Fourth Amendment rights. (J.App. at 79). The Eleventh Circuit failed to address the jurisdictional question, simply stating, "[a] defendant's entitlement to qualified immunity is a question of law. . . ." (J.App. at 69).[3]

SUMMARY OF ARGUMENT

For the reasons set forth by Respondent and other supporting *amici*, the ACLU agrees that qualified immunity was properly denied by both courts below. This brief, however, addresses the preliminary question of whether an immediate appeal was proper on the facts of this case. We believe it was not.

A district court's denial of a claim of qualified immunity is appealable only to the extent that it turns on a pure issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). A defendant "may not appeal a district court's summary judgment

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[3] Harris raised and preserved the jurisdictional issue in his Eleventh Circuit brief (Brief of Plaintiff/Appellee at 1-3) and in his Opposition to the Petition for Certiorari (Respondent's Response to Petition for Certiorari at 11).

order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Here, the district court's denial of Petitioner Scott's summary judgment motion expressly determined that the pretrial record set forth a genuine issue of fact for trial. Among other things, the court concluded that a reasonable jury could find, under Respondent Harris's version of the facts, that Scott's use of force was unconstitutional because it was not objectively reasonable. Moreover, the court found that a rational fact finder could find that a reasonable officer would not have believed that because of Harris's traffic offense, he posed an immediate threat to the safety of others. As in *Johnson v. Jones*, therefore, the district court order in this case identified a fact-related dispute about the pre-trial record. Its holding that the evidence in the pre-trial record was sufficient to show a genuine issue of fact for trial is, thus, not appealable.

Scott is only able to assert an issue that is appealable by mischaracterizing the district court's ruling. Although never explicitly stated, Scott's argument assumes that the district court erred in ruling that a finder of fact could conclude that Harris was not endangering innocent lives. His qualified immunity arguments are all premised on the "fact" that Harris was endangering others. To raise an appealable issue of law, Scott would have to claim that it was reasonable to ram Harris's car to make a traffic arrest even though there was no immediate threat to Scott, his fellow officers, or innocent parties. Scott has not raised that pure issue of law, and therefore, there was no jurisdiction in the court of appeals to hear his appeal.

ARGUMENT

THE DISTRICT COURT'S QUALIFIED IMMUNITY DECISION RESTS ON THE DETERMINATION THAT THERE WERE GENUINE ISSUES OF FACT FOR TRIAL AND THUS WAS NOT PROPERLY SUBJECT TO IMMEDIATE APPEAL.

A. The District Court's Order Provides No Collateral Issue For The Appellate Court To Review.

Appeals before the end of district court proceedings are the exception, not the rule. *Johnson v. Jones*, 515 U.S. 304, 309 (1995). "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The collateral order doctrine provides that certain orders amount to "final decisions," immediately appealable under 28 U.S.C. § 1291, even though the district court may have entered those orders before the case has ended. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Collateral orders are those that fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* The collateral order doctrine has been restated as a three part test requiring that the order sought to be appealed "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Johnson*, 515 U.S. at 310-11 (quoting *Puerto Rico Aqeduct and Sewer Authority v. Metcalf & Eddy, Inc.* 506 U.S. 139, 144 (1993) (brackets in original) quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). An order denying summary judgment based on a claim of qualified immunity may be an appealable collateral order, but

only if it presents the pure legal issue as to whether the facts alleged by the plaintiff demonstrate a violation of clearly established federal law. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (reviewing the constitutionality of a warrantless wiretap).

In *Johnson v. Jones*, this Court held that the collateral order doctrine does not provide for an appeal from an order denying a motion for summary judgment based on qualified immunity if the issue raised on appeal is "whether or not the evidence in the pretrial record [is] sufficient to show a genuine issue of fact for trial." 515 U.S. at 307. In *Johnson*, the plaintiff accused police officers of using excessive force. *Id.* Three of the officers moved for summary judgment on the ground that there was no evidence that they beat or abused the plaintiff. *Id.* The plaintiff challenged this claim. *Id.* at 307-08. The district court denied summary judgment. Taking the evidence in the light most favorable to the plaintiff, it ruled that "there is sufficient circumstantial evidence supporting [plaintiff's] theory of the case." *Jones v. Village of Villa Park*, 1993 WL 437415, *3 (N.D. Ill. 1993).

The three officers appealed, asserting the defense of qualified immunity. Their argument, however, was based on a claim that the district court erred in finding that there was sufficient record evidence to submit the case to a jury. *Johnson*, 515 U.S. at 308. They did not deny that if they had beaten the plaintiff as he alleged, they lacked immunity. *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994). This was then a factual dispute over which the court of appeals found it lacked jurisdiction to hear an immediate appeal. *Id.*

This Court affirmed the Seventh Circuit. Analyzing the rationale underlying *Mitchell v. Forsyth*, the Court found that rationale did not apply to cases that did not present "neat abstract issues of law." *Johnson*, 515 U.S. at 317. In *Mitchell*, the issue was purely legal; in *Johnson* the issue was one of fact—was there evidence to support a claim that the police-

man had beaten the plaintiff. *Johnson*, 515 U.S. at 307. In *Mitchell*, the legal issue of whether the law was clearly established did not require the appellate courts to "consider the correctness of the plaintiff's version of the facts . . ." 472 U.S. at 528. In *Johnson*, the same fact-related issues underlay the immunity issue and the case on the merits. 515 U.S. at 315. As this Court explained:

> Where . . . a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such "separate" question-one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.

Id. at 314 (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986); *Elliott v. Thomas*, 937 F.2d 338, 341 (CA7 1991); *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (CA8 1986)). This Court limited appeals of claims of qualified immunity to cases presenting "neat abstract issues of law" and held a defendant asserting qualified immunity may not appeal a summary judgment denial insofar as the issue is whether the pre-trial record sets forth a genuine issue of fact for trial. *Johnson*, 515 U.S. at 317. In *Crawford-El v. Britton*, this Court affirmed its holding in *Johnson*, noting that it refused in *Johnson* to create an exception to the settled interlocutory appeal rule and rejecting the argument that the policies behind the qualified immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. 523 U.S. 574, 595 (1998) (citing *Johnson*, 515 U.S. at 317-18).

In the present case, the district court found that Harris had raised a genuine issue of fact as to whether his conduct would place anyone else at risk. (J.App. at 48). This is precisely the sort of factual issue that is not appealable under *Johnson v. Jones*. Resolving the facts in the non-movant's favor, as it

must, the district court concluded that "[a] rational fact-finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others." (J.App. at 48). Except for the incident in the parking lot, "Harris did not use his vehicle in an aggressive manner," and taking the facts in Harris's favor, "either Scott hit Harris, or . . . the crash was an accident." (*Id.*) "[T]he decision to ram the vehicle came minutes later, when Harris was driving away from the officers, and when there were no other motorists or pedestrians nearby, thus casting doubts on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm to others." (J.App. at 48-49). Accordingly, a jury could "find that Scott's use of force—ramming the car while traveling at high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable." (*Id.*) (citing *Vaughn v. Cox*, 2003 U.S. App. LEXIS 18066, at *16 (11th Cir. 2003)) (stating that a reasonable jury could conclude that an officer's use of deadly force against two fleeing suspects was unreasonable where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.") Thus, the court was "compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." (J.App. at 51) (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 251-52 (1986)).

B. Petitioner Ignores The District Court's Ruling That Summary Judgment Was Inappropriate On His Qualified Immunity Claim Because A Triable Issue Of Fact Exists.

1. *The Issues Scott Has Raised Assume Facts That The District Court Found Were Controverted.*

An examination of Scott's qualified immunity argument reveals that he does not raise a neat abstract issue of law, but rather, as in *Johnson*, is challenging whether the pre-trial record sets forth a genuine issue of triable fact. By refusing to accept the findings of the district court, Scott implicitly invites this Court to search the record and conclude that the district court erred when it found there was sufficient evidence to support a finding that Harris did not pose a threat to the lives or safety of others. That this is so is revealed by Scott's articulation of the Questions Presented. The first is whether his conduct was objectively reasonable when he made a split-second decision to strike Respondent Harris's car with his bumper "*when the suspect has demonstrated that he will continue to drive in a reckless and dangerous manner that puts innocent lives at risk.*" (Brief for Petitioner at i.) (emphasis added). The second question Scott has presented is whether it was clearly established at the time of the incident that the Fourth Amendment was violated when a law enforcement officer bumps a fleeing suspect's vehicle "*terminating a dangerous high-speed pursuit.*" [4] (*Id.*) (emphasis added).

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[4] The Statement of Issues in Defendant's Court of Appeals brief continued similar language: "Whether Deputy Scott's conduct in contacting plaintiff's vehicle rises to the level of constitutional violation *where plaintiff was an imminent threat to public safety.*" (Def. Appellate Brief at 3.) (emphasis added).

Scott can create a collateral issue for appeal only by misstating the district court's ruling. The district court did not hold that it would be objectively unreasonable to ram Harris's vehicle if Harris had demonstrated that *he would continue to drive in a reckless and dangerous manner that would endanger the lives of innocent persons.* Nor did it hold that it was clearly established that *a dangerous, high-speed pursuit* could not be terminated by bumping the fleeing vehicle. Rather, it ruled that there was a genuine issue of fact as to whether Harris's driving was so dangerous and so reckless that it threatened the lives and safety of innocent persons. (J.App. at 48). The record was such that a finder of fact might find that Harris was not endangering innocent lives. Scott therefore has not presented neat abstract legal issues to this Court but implicitly asks the Court to comb the record and rule that the district court erred when it found the evidence to present a triable issue of fact.

2. *Scott Chose Not To Claim There Would Be No Constitutional Tort If The Facts Were All Resolved In Harris's Favor.*

Scott does not argue that there was no clearly established constitutional tort if he used deadly or unreasonable force to seize a suspect who had merely committed a traffic offense and whose flight did not put the lives and safety of others at risk. He did not make such a claim in the courts below, and he does not make such a claim here. While Scott does not explicitly say, as the officers did in *Johnson*, that he would not be entitled to immunity if the facts were resolved entirely in Harris's favor, he effectively concedes this point. His failure to claim that he would be entitled to immunity, regardless of how a jury found the facts, is an implicit acknowledgment that he has not raised a purely legal issue. Rather, it is crucial to his qualified immunity defense that the safety and lives of others were at risk and that Harris would continue to engage in reckless and dangerous driving even if Scott had broken off the chase.

Whether Harris's driving was putting the lives of others at serious risk of death and whether he would have continued to do so were disputed issues of fact. The record did not conclusively resolve these issues. For example, at one point in the chase, there was a minor collision in a parking lot between Harris's and Scott's cars. Scott claimed that Harris rammed him, but Harris claimed the contact was unintentional, resulting from Scott driving his car directly into Harris's path and Harris's effort to avoid a collision. (J.App. at 22-23). Similarly, Scott claimed Harris's driving endangered others, but taking the facts in the light most favorable to Harris, the district court found that when Scott sought permission to make physical contact in order to stop Harris, "there were no motorists or pedestrians nearby . . . ." (J.App. at 48). There was also a dispute as to whether Scott slowed down or sped up before he rammed Harris. (J.App. at 29).

3. *Scott's Brief Before This Court Ignores The District Court's Findings.*

An examination of the Brief for Petitioner shows how he has ignored the findings of the district court as to what material facts are in dispute, and instead has assumed a version of the facts most favorable to himself. Two recent courts of appeals opinions have cautioned police officers, appealing the denial of summary judgment motions raising qualified immunity in cases asserting Fourth Amendment violations arising out of arrests involving excess force, that they must accept the facts presented by the plaintiff below or found by the district court. In *Sallenger v. Oakes*, ___ F.3d ___, 2007 WL 60422 (7th Cir.) (Decided Jan. 10, 2007), the court noted that the officers' brief seemed to question the findings of the district court that there exist genuine issues of material fact as to whether excessive force was used. "Importantly, though, a defendant in such a case must accept the facts as found by the district court in order for us to have jurisdiction to hear the case." *Id.* at *6 (citation

omitted). Because the officers conceded in response to a motion to dismiss and at oral argument that they accepted the district court's version of the facts for summary judgment purposes, a motion to dismiss for lack of jurisdiction was denied. *Id.* The court noted that in light of the officers' concession, it could decide qualified immunity as a matter of law without reviewing the findings of fact. *Id.*

The same issue arose in another case decided on the same day in another circuit. In *Adams v. Speers*, ___ F.3d ___, 2007 WL 60386 (9th Cir.) (Decided Jan. 10, 2007), the court noted that at times the officer's briefs "lapse into disputing [plaintiff's] version of the facts and even into offering his own version of the facts." The court warned the California Attorney General who was defending the officer that "such practice could jeopardize our jurisdiction to hear the interlocutory appeal." *Id.* at *1. Such an appeal from a ruling on immunity can be made "only if [the officer] accepts as undisputed the facts presented by the appellees." *Id.* The court was able to hear the appeal because the briefs showed that the officer was aware of the maxim governing such appeals, and accordingly the court construed his position to be that accepting the facts as pled, he was entitled to qualified immunity. *Id.* Scott, however, does not accept the facts as found by the district court.

The following examples are references to assertions in Scott's brief before this Court, followed by either what the district court actually found or what the court found that the record, taken in the light most favorable to Harris, might support:

- Scott assumed the pursuit was part of an undercover narcotics operation. (Brief for Petitioner at 3.) There was no such finding by the district court. Such a finding would turn entirely on Scott's credibility. The district court found only that Scott did not know what Harris was suspected of doing. (J.App. at 50).

- Scott was under the reasonable belief that he was pursuing a suspect who was part of a controlled buy of illegal drugs. (Brief for Petitioner at 18.) There was no such finding by the district court. (J.App. at 50). The claim would be based solely on the credibility of Scott's testimony.
- Undeterred by Scott's effort to block him in the parking lot, Harris collided with Scott's car. (Brief for Petitioner at 4.) Either Scott hit Harris or the collision was an accident. (J.App. at 48).
- Scott picked a moment to ram Harris when there were no motorists or pedestrians around. (Brief for Petitioner at 4.) Harris posed no immediate threat in part because the Peachtree Police had blocked the intersections, and there were no pedestrians or motorist in the vicinity. (J.App. at 48-49). The district court made no finding as to Scott's motive.
- Scott testified his intention was to stop Harris and not wreck his vehicle. (Brief for Petitioner at 5.) The district court made no such finding, which would turn entirely on Scott's credibility.
- Scott attempted to end a dangerous, high speed automobile chase. (*Id.* at 7.) At the time of the ramming, Harris posed no immediate threat of harm to others. (J.App. at 48-49).
- Scott asked for and obtained permission to stop Harris's vehicle. (Brief for Petitioner at 7.) Scott asked permission to employ a PIT maneuver, received approval to "take him out," and then decided to ram Harris at high speed because the speed was too fast to use the PIT maneuver. (J.App. at 40-41).
- Breaking off pursuit would not eliminate risk to the public because the driver would continue to drive recklessly after the officers withdrew. (Brief for Petitioner at 11.) (There is no record support cited.) No such finding was made by the court; Harris posed no immediate threat to others. (J.App. at 49).

- Harris had established that his reckless driving posed a substantial and ongoing threat to the public, the officers, and himself. (Brief for Petitioner at 17.) Harris posed no immediate threat to others. (J.App. at 49).[5]

4. *Taking The Facts In The Light Most Favorable To Harris, Scott Committed A Clearly Established Constitutional Tort.*

Given the state of the record and resolving the factual disputes in Harris's favor, a jury could find that this is a case of a law enforcement officer so reckless that he engaged in a high-speed chase without learning for what offense the suspect was wanted. The suspect was sought for only a traffic violation. Although the suspect tried to avoid a collision, the officer and the suspect accidentally collided when the officer drove his car into the suspect's path. The officer's car was damaged. He then obtained permission to employ a low-speed impact technique to stop the suspect, even though he had not been trained in this technique. He could not employ the technique because of the speed of the chase. Enraged by the damage to his vehicle, and frustrated by his inability to stop the suspect, the officer determined to employ a highly dangerous, high-speed ramming technique. He did so even though it was late at night, on a road with no traffic or pedestrians. No other motorist or pedestrian had been injured or even suffered a close call. The suspect had maintained control of his car at all times, and at the time of the ramming, was driving away from the officer and posed no immediate threat of harm to others. The officer accelerated before he

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[5] The United States' brief similarly misstates the record. *See* Brief for the United States as *Amicus Curiae* at 2 (Scott assumed he was in pursuit in connection with undercover operations; Harris struck Scott), *Id.* at 3 (Harris was acting recklessly and endangering others; Scott made contact when no other motorists were in the area to prevent an accident), *Id.* at 6 (extremely dangerous vehicular flight; serious risk of injury and death).

rammed the suspect, increasing the force of impact. The officer knew or should have known that the likely result when a vehicle is rammed from behind at high speed is that the driver will lose control and the vehicle will collide with some object before it stops. Such a collision at high speed is life threatening.

Tennessee v. Garner, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), established that a police officer acts unreasonably when he uses deadly force to seize an unarmed, nondangerous suspect. Only if the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or others, is it constitutionally reasonable to prevent escape by using deadly force. *Garner*, 471 U.S. at 11. Under the scenario set forth above, Scott would not have had probable cause to believe that Harris posed a serious threat to the officers or others. This contrasts with the facts in *Brosseau v. Haugen*, 543 U.S. 194 (2004), this Court's most recent decision on the qualified immunity question. In *Brosseau*, where this Court ruled that the unconstitutionality of the use of deadly force was not clearly established, the suspect was wanted on a no-bail, felony warrant; had been fighting with others when the officer arrived; was believed by the officer to have a weapon in his car; and admitted to having driven his car in a manner indicating "a wanton or wilful disregard for the lives . . . of others." *Id.* at 195-97.[6] Here, taking the facts in the light most favorable to Harris, he was not wanted for a felony, but for speeding; he had not fought anyone; there was no suggestion that he had a weapon; and his driving did not threaten others. Again, assuming Harris's version of the facts, Scott acted unreasonably by using deadly force to seize an

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[6] There was no jurisdictional issue in *Brosseau* because the district court had granted the officer's motion for summary judgment, which was clearly a final order terminating the case.

unarmed, nondangerous suspect, which *Garner* and *Graham* clearly establish is a Fourth Amendment violation.

While there are certainly no conclusive findings that this scenario actually occurred, a jury could so find depending on how it evaluates the evidence and the creditability of the witnesses, including Scott. Because Scott implicitly and correctly concedes he would not be immune under this factual scenario, the issues he brings to this Court assume contested facts, *e.g.*, that Harris posed a threat to the lives of others if he was not stopped. By assuming that there was such a threat, Scott assumes facts about which there is a genuine dispute, and which the district court determined a jury might find to the contrary. This Court can only rule in Scott's favor if it inspects the record and overturns the district court's finding that the record supports a factual scenario contrary to Harris's version. In short, this case presents factual issues that must be resolved by the trier of fact and that cannot be appealed until that occurs.

5. *Even If Scott Had Raised A Pure Legal Issue, This Court Should Not Review The Pendant Claim of Whether The Record Evidence Raised Material Issues of Fact.*

If Scott had raised the issue in the district court and on appeal whether it was clearly established that a law enforcement officer may not use deadly force to apprehend a suspect in a traffic offense when there is no evidence that he was fleeing in a fashion that endangered the safety and lives of innocent persons, he might have raised an appealable issue, although not one on which he could prevail. Even if Scott's argument could be construed as raising this pure legal issue, the court of appeals should have declined to hear the pendant issue of whether there was a genuine factual issue for trial, once a determination had been made that Scott could not prevail on the issue of law.

In *Johnson,* this Court addressed the concern that defendants might seek to create a reviewable summary judgment order by adding a reviewable claim to a motion that otherwise would create an unreviewable order. 515 U.S. at 318. This Court conceded that, "if the District Court . . . had determined that beating respondent violated clearly established law, petitioners could have sought review of *that* determination." *Id.* [7] Nevertheless, this Court emphasized that it did not follow that a court of appeals would review the more important determination that there was a genuine issue of fact for trial, as to whether the beating had in fact occurred. *See id.* Moreover, while "pendant appellate jurisdiction" over factual issues may sometimes be appropriate when an abstract issue of law has been raised, this Court has placed its trust in courts of appeals to deny jurisdiction where the appealable issue is simply a means to lead the court to review the underlying factual matter. *Id.* (citing *Natale v. Ridgefield,* 927 F.2d 101, 104 (CA2 1991) (saying exercise of pendant appellate jurisdiction is proper only in "exceptional circumstances"); *United States ex. rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co.,* 909 F.2d 259, 262 (CA7 1990) (saying exercise of such jurisdiction is proper only where there are "'"compelling reasons"'")). [8]

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[7] The parallel finding here would be a determination that using deadly force to apprehend a traffic law suspect, who posed no immediate threat to others, violated clearly established Fourth Amendment standards.

[8] Appellate Courts have heeded this Court's caution against engaging in a detailed fact-based analysis in immediate appeals. *See Howser v. Anderson,* 150 Fed.Appx. 533, 540 (6th Cir. 2005) (quoting *Johnson,* 515 U.S. at 316) (holding the court lacked jurisdiction over the appeal because genuine issues of material fact as to whether a police officer had cause to believe that the decedent posed a threat of serious physical harm to the officer or others existed); *McKinney v. Duplain,* 463 F.3d 679, 689 (7th Cir. 2006) (rejecting appellate jurisdiction because a factual issue remained as to whether it was reasonable for the defendant to believe that the situation posed a threat of serious physical harm to himself or others);

C. This Court's Post-*Johnson* Opinion In *Behrens v. Pelletier* Does Not Alter The Fact That The District Court's Ruling In This Case Is Not Appealable.

Although procedurally complex, and primarily focusing on the question of whether a defendant could raise qualified immunity on a motion for summary judgment following a denial of a motion to dismiss raising the same issue, the relevant facts of *Behrens v. Pelletier*, 516 U.S. 299 (1996) are simple. Pelletier was hired by a savings and loan subject to Federal Home Loan Bank Board approval. *Id.* at 302. Behrens refused to give that approval because of a pending investigation of another institution that had employed Pelletier. *Id.* Pelletier was therefore fired. He sued claiming a substantive due process violation for interference with his clearly established constitutionally protected property and liberty rights, including his right to earn a future livelihood in the industry. *Id.*

Behrens raised qualified immunity in his summary judgment motion, contending that his actions had not violated any of Pelletier's clearly established rights regarding his employment. *Id.* at 303. The district court denied the motion with a simple statement that there were unresolved material issues of fact. The court of appeals dismissed Behrens's appeal for lack of jurisdiction. *Id.* at 305.

Before this Court, Pelletier argued that the district court's decision was not appealable because its order had rested on the ground that material issues of fact remain. *Id.* at 312. This Court rejected this over-broad interpretation of *Johnson v. Jones*. *Id.* at 312-13. Instead it held that *Johnson* meant

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Linbrugger v. Abercia, 363 F.3d 537, 544 (5th Cir. 2004) (court lacked jurisdiction over sheriff's deputy's appeal given that there was a material factual dispute as to the actual or perceived provocation and resistance by the plaintiff, and the extent and proportion of the defendant's response).

that "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision.'" *Id.* at 313. In *Behrens*, even though the conduct was controverted, taking the facts that were controverted in the light most favorable to the plaintiff, the defendant argued that there was no violation of clearly established law. The district court rejected that contention, giving rise to an appealable final order.

Here the district court found that under some version of the controverted facts, Scott's conduct did violate clearly established law. For example, it said that the controverted facts could be resolved to conclude that Scott rammed Harris even though he posed no danger to others at the time. (J.App. at 49). Scott does not contend that if those facts are true, he would not have committed an established violation of law. Instead, he argues that those facts are not true. He therefore seeks to appeal whether the evidence could support a finding that particular conduct occurred, *e.g.*, that Harris's driving did not threaten the lives of others. *Behrens* reaffirms the holding in *Johnson* that such a sufficiency judgment is not immediately appealable just because it arises in a qualified immunity case.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction and this case should proceed to trial on the merits. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FDN.
125 Broad Street
New York, NY 10004
(212) 549-2611

GERALD R. WEBER
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA
75 Piedmont Avenue,
Suite 514
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(404) 523-6201

HAMILTON P. FOX, III *
BRIAN C. SPAHN
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
(202) 383-0100

* Counsel of Record for the *Amici Curiae*

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In the Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY,
GEORGIA DEPUTY SHERIFF,
Petitioner,

v

VICTOR HARRIS,
Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, GEORGIA ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF NEITHER PARTY

MICHAEL A. CALDWELL
DELONG, CALDWELL & BRIDGERS, LLC
101 MARIETTA STREET NW
SUITE 3100 CENTENNIAL TOWER
ATLANTA, GEORGIA 30303
(404) 979-3150
Counsel for Amicus Curiae

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

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The Georgia Association of Chiefs of Police, Inc. (hereinafter referred to as the "GACP"), with the written consent of Counsel for Appellant and of Counsel for Appellee, hereby respectfully submits its *Amicus Curiae* Brief in support of neither party. [1]

IDENTITY AND INTEREST OF AMICUS CURIAE

The Georgia Association of Chiefs of Police, Inc. (*"GACP"*) is a Georgia non-profit corporation. It is both the largest professional association for law enforcement agency heads in the State of Georgia, and one of the largest such organizations in the United States. Its principle Active Members include more than 778 Chief Executive Officers of municipal, county, state, and federal law enforcement agencies, railroad law enforcement agencies, public school police, and private and public college and university police departments in Georgia.

The GACP's Constitution and Bylaws describes its Mission as:

> . . . dedicated to providing police services in the State of Georgia that are aimed at achieving more effective and efficient crime control, reduced fear of crime, improved quality of life, and improved police legitimacy through a proactive reliance on community resources that seeks to minimize crime causing conditions.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae certifies that no counsel for a party authored any part of this Brief, nor did any person or entity other than *Amicus Curiae*, its members, or its counsel make any monetary contribution to the preparation or submission of this Brief.

> The Georgia Association of Chiefs of Police strives to ensure that all our citizens are served in a professional, ethical and equitable manner that respects individuals, protects our democratic ideals and system of government, pursues greater accountability of police, greater public share in decision making, and greater concern for civil rights and liberties.

One of the GACP's most important functions is to provide and approve all training and education required for Police Chiefs and non-elected chief executives of state, county and municipal law enforcement agencies and campus police agencies throughout Georgia under O.C.G.A. §35-8-20 and under the Peace Officer Standards and Training Council ("POST") Regulations. Thus, the GACP possesses a uniquely broad and comprehensive perspective on the key issues before the Court in the present matter.

STATEMENT OF THE CASE

Since it is not seeking to advance the cause of either Party to this case Amicus adopts the Statements of the Case presented by both Parties.

SUMMARY OF ARGUMENT

High-speed police vehicular pursuits, while dangerous, are sometimes necessary for the protection of the public. In carefully-defined circumstances, the execution of a Precision Immobilization Technique or "PIT maneuver" by an officer who has been specifically trained to competently execute the tactic need not create undue risk to the safety of the

participants or the public.[2] If it is employed in accord with policies carefully developed to ensure due regard for the rights and safety of the participants and of the public, the use of a PIT maneuver will not violate a suspect's or the public's constitutional rights. Thus the PIT maneuver should remain available in the arsenal of legitimate law enforcement tools.

ARGUMENT

Police pursuits are sometimes necessary to apprehend dangerous felons or traffic violators who are creating an imminent and substantial danger to the public. Tragically they also can result in death or serious injury to the fleeing suspect, innocent bystanders, or even the officer himself. The Georgia Supreme Court succinctly articulated this perplexity in *City of Winder v. McDougald,* 276 Ga. 866, 867 (2003) (quoting *Archer v. Johnson,* 90 Ga. App. 418, 424 (1954)) when it stated:

> "While it is desirable . . . that the officer overtake[s] and apprehend[s] the criminal, . . . it is equally as important that innocent persons, whether or not connected with the emergency to be met, not be maimed or killed in the operation."

Id. at 867.

In response to the dilemma confronting law enforcement agencies, the Executive Board of the Georgia Association of Chiefs of Police commissioned an *Ad Hoc* Committee to review police pursuits and to provide guidance to Georgia's

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[2] Insofar as Amicus is supporting neither party in this case, it does not take a position on the factual issue of whether Appellant Scott's action in this case constituted a PIT maneuver.

law enforcement executives for the development of sound legal and common-sense pursuit policies. Gathering information from several different perspectives, the Committee was comprised of law enforcement professionals, trainers, academic advisers and attorneys. In forming its conclusions and advice the Committee's members considered current law, policy concerns, technology issues, and the research data compiled and reported by the Georgia Institute of Technology Research Project on the Precision Immobilization Technique (PIT).

On July 22, 2006 the Executive Board of the GACP adopted the report and recommendations of the *Ad Hoc* Committee, entitled *LAW ENFORCEMENT PURSUITS IN GEORGIA: REVIEW AND RECOMMENDATIONS* (hereinafter referred to as "Report and Recommendations") [3]

The Report and Recommendations focus specifically upon the following subjects: (1) statistical data regarding police pursuits; (2) Georgia law governing police pursuits; (3) policy considerations in preparing a pursuit policy; (4) the PIT Maneuver; and (5) technological alternatives to pursuits. It concluded with recommendations to the Georgia law enforcement community regarding police pursuits.

To assist the Court in the instant case, *Amicus Curiae* GACP submits its Report and Recommendations which are contained in Appendix A.

Of particular significance is the Report's conclusion, based on the Georgia Institute of Technology ("Georgia Tech") research results, that:

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[3] Minor revisions were made to the Report and Recommendations of the Ad Hoc Committee, and the Report was issued to the public on August 8, 2006.

> . . . the Georgia Tech research confirms law enforcement's experience with the PIT maneuver. Properly performed by a trained driver under certain conditions, it is controlled, predictable method to stop a pursuit. The PIT maneuver can be simulated utilizing a computer model. The computer simulation results as to the force needed to perform the maneuver displayed the same linear, predictable trend as did the experiments with actual vehicles. Additionally, the research demonstrates that the PIT maneuver is not the same as ramming. It uses far less force than a ram. Moreover, the ramming of a suspect vehicle is not controlled and hence, not predictable.

(/Id./ at A-78, /footnote omitted/)

CONCLUSION

The PIT Maneuver can be a useful tool in the repertoire of techniques employed by law enforcement officers to apprehend violent felons and dangerous criminals. If executed by a properly-trained officer in accord with the recommendations contained in the Report and Recommendations, the PIT maneuver need not unduly infringe upon the Constitutional rights of the participants or the public.

Respectfully, *Amicus Curiae* submits that it is vital to public safety that this means of protecting the public remain available to law enforcement agencies.

Respectfully submitted,

Michael A. Caldwell
DeLong, Caldwell & Bridgers, LLC
101 Marietta Street NW
Suite 3100 Centennial Tower
Atlanta, Georgia 30303
(404) 979-3150
Counsel for Amicus Curiae

[LOGO
Georgia Association
Chiefs of Police]

Law Enforcement Pursuits in Georgia: Review and Recommendations

Submitted by the Ad Hoc Committee
on Law Enforcement Pursuits

Adopted by the Georgia Association of Chiefs of Police Executive Board

July 22, 2006
(Revised August 8, 2006)

Ad Hoc Committee on Law Enforcement Pursuits

Ad Hoc Committee Chairman

Chief Louis Dekmar, LaGrange Police Department

Ad Hoc Committee Members

Chief Deputy Mike Boyd, Gwinnett County Sheriff's Office
Chief Woody Blue, Milledgeville Police Department
Chief Rick Boren, Columbus Police Department
Chief Mike Burns, Macon Police Department
Chief George Coleman, Fulton County Police Department
Deputy Director Dawn Diedrich, Esq., Georgia Bureau of Investigation
Dr. Robert Friedmann, Georgia State University
Chief John Harden, Sandersville Police Department
Chief Jack Lumpkin, Athens-Clarke County Police Department
Director Dale Mann, Georgia Public Safety Training Center
Director of Operations Tony M. McClung, Georgia Association of Chiefs of Police
Lt. Paul Michaud, Fulton County Police Department
Chief Jim Murray, Peachtree City Police Department
Chief Steve Parks, Chattanooga Police Department
Captain Russell D. Powell, Georgia State Patrol
Director Frank V. Rotondo, Georgia Association of Chiefs of Police
Chief Frank Simons, Valdosta Police Department

I. Introduction

Police pursuits are an area that is increasingly scrutinized by the public. Police pursuits can result in the apprehension of forcible felons or traffic violators who have created a danger to the public. Pursuits also can result in the death or injury to innocent bystanders and the police officers who are pursuing the suspect. Law enforcement agencies across the country are faced with the dilemma of when to engage in pursuits. The Georgia Supreme Court has succinctly articulated this dilemma in a recent case:

> "While 'it is desirable . . . that the officer overtake[s] and apprehend[s] the criminal, . . . it is equally as important that innocent persons, whether or not connected with the emergency to be met, not be maimed or killed in the operation.' "[1]

In response to this dilemma, on September 19, 2005 at a Georgia Association of Chiefs of Police Executive Board Meeting, President Chief Bryan Golden charged LaGrange Police Chief Louis M. Dekmar with chairing an Ad Hoc Committee (hereinafter "the Committee") to review police pursuits.[2] The Committee's purpose was to review the issue of police pursuits and provide guidance to Georgia's law enforcement executives for the development of sound, legal and common-sense pursuit policies. In an effort to gather information from several different perspectives, the Committee was comprised of law enforcement professionals,

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[1] *City of Winder v. McDougald*, 276 Ga. 866, 867 (2003) (quoting *Archer v. Johnson*, 90 Ga. App. 418, 424 (1954)).

[2] Georgia Association of Chiefs of Police, Executive Board Meeting Minutes 3 (September 19, 2005).

trainers, academic advisers, and attorneys.

To this end, the Committee or subgroups of the Committee met nine times to discuss current law, policy issues, technology issues, and the Georgia Institute of Technology research project on the Precision Immobilization Technique (PIT). This paper is the result of these meetings and the input of all members. It will focus specifically on (1) statistical data regarding police pursuits; (2) the law regarding pursuits in Georgia; (3) policy considerations in preparing a pursuit policy; (4) the PIT Maneuver; and (5) technological alternatives to pursuits. At the conclusion of the paper, the Committee will make recommendations to Georgia's law enforcement community regarding police pursuits.

II. Statistical Data Regarding Police Pursuits

As the purpose of this paper is to provide guidance to policymakers writing pursuit policies, the Committee wanted to obtain data regarding pursuits. There is no national or statewide database regarding pursuits. In order to learn about pursuits in Georgia, the Committee first polled Georgia Association of Chiefs of Police member agencies and requested their data regarding pursuits. The Committee also reviewed the nationwide literature regarding pursuits. This research is very limited.

The scant research that has been compiled in the area of police pursuits has been published primarily by Dr. Geoffrey Alpert, Professor of Criminal Justice at the University of South Carolina. In an interview conducted by Mr. Jim Phillips of PursuitWatch, Dr. Alpert says:

> Jim Phillips: You mentioned that there is no national pursuit data. Would you support legislation that required the mandatory

collection of that data on a national basis?

> Dr. Alpert: Several attempts have failed to have police agencies collect and report pursuit data voluntarily. Attempts at legislative reform have failed in congress. My sense is that if agencies are unwilling to voluntarily collect and report data, then they should be required to do so. There are a dozen states that have reporting systems and the IACP has a repository. I do not hold much hope, as there is no national reporting system for the use of firearms."[3]

As Dr. Alpert states, there is no nationwide database for police pursuits. There is no information on the number of pursuits per year, the number of accidents due to pursuits or the number of injuries due to pursuits.

There is information regarding fatalities associated with police pursuits available from data collected by the National Highway Traffic Safety Administration (NHTSA) that has been reported in the literature. In a 2002 article by John Hill, he discussed these statistics:

> The National Highway Traffic Safety Administration (NHTSA) reported that 314 people were killed during pursuits in 1998. Of this total, 2 were police officers and 198 were individuals being chased. The remaining 114 were either occupants of unrelated vehicles or pedestrians. The total was higher in each of

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[3]Phillips, James, *"PursuitWatch Interview with Dr. Geoffrey Alpert"* (2003) retrieved from http://pursuitwatch.org/index.shtml on June 16, 2006.

the 4 previous years.[4]

Looking at the 1998 statistics in terms of percentages, 63% of those killed were the suspect, 36% were bystanders and 1% was the pursuing officer.

Hill also stated that, "one organization estimates that about 2,500 persons die each year as a result of police pursuits and that another 55,000 are injured."[5] Even PursuitWatch, a Website founded by a father whose daughter was killed as a result of a police pursuit, does not claim that many deaths. According to "PursuitWatch Data," there are 14,000 injuries and 700 pursuit deaths each year.[6] These numbers are simply extrapolations and not based upon actual reports because there is no reporting system other than for fatalities.

The Committee requested current data from the NHTSA and has prepared a chart of this information.[7] The chart lists the fatality data from 1994 to 2004.

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[4]Hill, John, *High-speed Police Pursuits: Dangers, Dynamics, and Risk Reduction,* FBI LAW ENFORCEMENT BULLETIN, 15 (July 2002).

[5]Hill at 15 (citing newspaper article as support for statement but no reference as to name of organization).

[6]Phillips, James, *Police Pursuits – A National Epidemic* (Dec. 7, 2003) retrieved from http://pursuitwatch.org/stories/epidemic.htm on June 6, 2006.

[7]The NCSA's Information Services Branch prepared reports of Fatalities in Crashes Involving Law Enforcement in Pursuit for the years 1994 to 2004 on September 13, 2005. Each year's report is broken down by individual states. There is no indication from the report if there are states that are not providing data as stated by Hill. Hill at 15.

Fatalities in Crashes Involving
Law Enforcement in Pursuit1994 – 2004

Deaths Year	1994	1995	1996	1997	1998	1999
Suspects	284	249	267	193	201	212
Occupant of Other Vehicle	93	117	106	100	105	99
Non-Occupant	12	10	9	11	14	5
Officers	3	10	5	1	2	3
Total	392	386	390	305	322	319

Deaths Year	2000	2001	2002	2003	2004	Total
Suspects	190	223	248	229	214	2510
Occupant of Other Vehicle	103	121	121	106	108	1182
Non-Occupant	10	22	11	13	12	129
Officers	7	4	6	6	9	56
Total	310	370	386	354	343	3877

Based upon this data from 1994 to 2004, the average number of fatalities due to police pursuits across the United States is 352.5 per year. According to Hill, this NHTSA system is not a mandatory reporting system. "Typically only 90 percent of states report pursuit fatality data to NHTSA."[8] After reviewing the data provided by the NHTSA, the Committee was unable to determine whether certain states were not providing data. The Committee would, however, agree with Dr. Alpert's statement from 1997 that: "Nationally, very

[8]Hill at 15.

little is known about police pursuit driving."[9]

The Committee also requested pursuit data from Georgia Association of Chiefs of Police member agencies. The Committee received data from 15 Georgia law enforcement agencies that reported vehicle pursuits in 2005.[10]

These agencies reported a total of 419 vehicle pursuits in 2005. Of these pursuits, 110 pursuits (26%) resulted in an accident. While some agencies broke this information down further into accidents with injuries and those without, others did not. Using only the information from those agencies that provided further information regarding injuries, there were 28 accidents with injuries, one fatality, and 51 accidents involved no injuries.[11]

Of these pursuits, the reason for initiating the pursuit (if known) is listed below:

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[9]Kennedy, Dennis J. and Geoffrey P. Alpert, *A National Survey of Pursuits and the Use of Police Force: Data from Law Enforcement Agencies,* 25 J. CRIM. JUSTICE 315 (1997).

[10]The agencies that responded are as follows: Fulton County Police Department, LaGrange Police Department, Georgia Tech Police Department, Cobb County Police Department, Gwinnett County Police Department, DeKalb County Police Department, Covington Police Department, College Park Police Department, Forsyth County Sheriff's Office, Duluth Police Department, Dawson County Sheriff's Office, Savannah-Chatham Board of Education Police Department, Marietta Police Department, Baldwin County Sheriff's Office and Columbus Police Department. This data did not include information from the Georgia State Patrol.

[11]No agency provided any information regarding the use of the PIT maneuver.

Nature of Offense	Number
Traffic Offenses	228
Driving Under the Influence	5
Hit and Run	1
Aggravated Assaults	3
Wanted Person	1
Armed Robberies	2
Drug-related	1
Felony Offenses	50
Other incidents	68

There were 235 (56%) arrests resulting from the related pursuits. A number of intervention methods were utilized in some of these arrests. There also were 80 pursuits which were terminated by the officer or supervisor.

There is no standardized method of reporting police pursuits. Yet, the literature is in agreement as to the need for a nationwide database for police pursuits.[12] The results of this limited survey reveal the need for a standardized reporting method in order to collect accurate data on police pursuits. See Appendix A for charts regarding this analysis.

The lack of a police pursuit database compiled from Georgia pursuits leaves policymakers with a void. Without accurate data, law enforcement is left to the tried, but sometimes untrue, method of trial and error. The number of assumptions that policymakers make, even when supported by anecdotal

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[12]*See e.g.* National Institute of Justice, *Pursuit Management Task Force: Research Preview 3 United States Department of Justice* (Aug. 1998)("A national model for collection of pursuit statistics should be developed for the purpose of encouraging and facilitating research and to expand the body of knowledge relating to pursuits.").

stories from personal experiences, probably leaves law enforcement with a very imperfect picture of the whole issue of pursuit. Although some agencies do a great job in an after action review of each chase, many do not. Even those who review each pursuit use different reporting systems that make the data unusable in the aggregate.

In an effort to obtain accurate, timely information, the Committee has created a single, user friendly report that can be used to collect pursuit information from Georgia agencies. The draft of such a collection tool is attached to this report as Appendix B. This proposed data collection sheet is a simple, concise form that gives sufficient data to start a data collection bank. Nothing on the form would suggest the name of the officer, nor suspect, except in generic demographics. Similar to the Uniform Crime Reporting System, it would provide concrete information to law enforcement, as well as the citizens of the State of Georgia. In terms of implementation, the Committee will leave it to the Georgia General Assembly and the Georgia Association of Chiefs of Police to determine the best method to implement such a collection tool.

III. Legal Cases in Georgia

In order to write a pursuit policy, it is first necessary to understand the legal requirements for a lawful pursuit. The law does not require that officers pursue violators of the law because it is the officer's discretionary decision whether to arrest the violator. Georgia law, however, does recognize that law enforcement officers will need to pursue fleeing violators of the law and sets forth the officer's duty during such a pursuit. This section will review Georgia statutory and case law regarding the following: (1) the definition of an emergency vehicle, including the required equipment; (2) the circumstances that authorize the operation of an emergency

vehicle; (3) the specific statutory exceptions to the requirements of the Title 40 of the Georgia Code regarding motor vehicles; and (4) the duty to drive with due regard for the safety of all persons. Lastly, this section will address the types of lawsuits that may arise out of a pursuit case, as well as defenses that may be available in these lawsuits.

A. Emergency Vehicle Operation in Georgia

Georgia law makes specific provisions for the operation of a law enforcement vehicle during the "pursuit of an actual or suspected violator of the law."[13] O.C.G.A. § 40-1-1 defines an "authorized law enforcement vehicle" as a "motor vehicle belonging to a federal, state, or local law enforcement agency."[14] When an authorized law enforcement vehicle is in pursuit of a violator, the driver may:

> (1) Park or stand, irrespective of the provisions of this chapter;
> (2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
> (3) Exceed the maximum speed limits so long as he or she does not endanger life or property; and
> (4) Disregard regulations governing direction of movement or turning in specified directions.[15]

In order to use these exceptions to Title 40 of the Georgia

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[13]O.C.G.A. § 40-6-6(a).

[14]O.C.G.A. § 40-1-1(5).

[15]O.C.G.A. § 40-6-6(b).

Code regarding motor vehicles, the driver of the law enforcement vehicle must utilize "an audible signal and a flashing or revolving blue light."[16]

Most significantly, however, these provisions do not "relieve the driver of an authorized emergency vehicle from the duty to drive with *due regard* for the safety of all persons."[17] Additionally, O.C.G.A. § 40-6-6(d)(2) addresses the situation where the "fleeing suspect . . . injures or kills any person during the pursuit" and provides that:

> the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury or death caused by the fleeing suspect unless the law enforcement officer acted with *reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit.*[18]

This provision provides the officer with a defense to a lawsuit by the innocent person who is injured by the fleeing suspect. This defense will be lost, however, if the officer has acted "with reckless disregard for proper law enforcement procedures." Most likely, the "proper law enforcement procedure" will be the agency's pursuit policy.[19] Hence the

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[16]O.C.G.A. § 40-6-6(c).

[17]O.C.G.A. § 40-6-6(d)(1) (emphasis added).

[18]O.C.G.A. § 40-6-6(d)(2) (emphasis added).

[19]*See City of Winder v. McDougald*, 254 Ga. App. 537 (2002) (holding that O.C.G.A. 40-6-6(d) did not apply to case because suspect did not fit within definition of person and denying summary judgment because expert witness testified that pursuit did not comply with agency

agency's pursuit policy will become relevant evidence in the lawsuit and the issue will be whether the pursuit was in compliance with the agency's pursuit policy. If the pursuit was not, then the officer loses the protection of O.C.G.A. § 40-6-6(d)(2) and may face liability if the suspect hits an innocent person.

In conclusion, it is the duty of the law enforcement officer to drive with "due regard" for the safety of all persons and also not to act with reckless disregard of the agency's pursuit policy.

B. Lawsuits Arising Out of Pursuits

In cases involving pursuits, there are two types of lawsuits that may arise. The first type is a state law tort action for negligence. The second type of lawsuit is brought pursuant to a federal law, 42 U.S.C. § 1983, and alleges a violation of the individual's constitutional rights, usually either the Fourth or the Fourteenth Amendment. This section will explain some typical lawsuits in these areas and also address the defenses available in each type.

1. Negligence Lawsuits

Most lawsuits arising out of a pursuit are negligence claims. Negligence is the "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[20] For example, if a police officer

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policy), *rev'd by City of Winder v. McDougald,* 276 Ga. 866 (2003). The Georgia Supreme Court reversed the judgment of the Court of Appeals and concluded that O.C.G.A. 40-6-6(d) did apply so summary judgment should have been granted to the city.

[20]BLACK'S LAW DICTIONARY 1056 (7th ed. 1999).

accidentally hits another vehicle during a pursuit and injures the driver of vehicle, the driver may file a negligence claim against the officer. The other common scenario is when the fleeing violator accidentally hits another vehicle while he is being pursued by an officer. In these cases, the collision is not intentional.

A negligence claim arises when there is a duty, a breach of the duty, damages or injury and a causal connection between the breach and the injury. This causal connection is referred to as proximate cause. As discussed, the duty of the officer is to drive with due regard for the safety of the public and not to recklessly disregard proper law enforcement procedures. If the officer breaches that duty and someone is injured as a result of that breach, then there may be a successful claim. The following cases will illustrate these principles.

a. *Sammor v. Mayor & Alderman of Savannah*

In *Sammor v. Mayor & Alderman of Savannah*[21] decided in 1985, the Georgia Court of Appeals determined that the officer's actions did not constitute the proximate cause of the plaintiff's injuries.[22] The case arose out of a pursuit by a Savannah police officer. During the pursuit, the suspect vehicle struck the plaintiffs' vehicle from behind and caused injuries. The suspect died as a result of the accident.

The pursuit was initiated by the officer, who was operating a motorcycle unit, when he first observed the suspect vehicle traveling at 70 to 80 miles per hour through a city intersection. The officer activated his lights and siren and

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[21] 176 Ga. App. 176 (1985).

[22] *Sammor*, 176 Ga. App. at 177-78.

notified police headquarters to dispatch ambulances to two different intersections ahead because the officer "knew" an accident was going to occur due to the high speed of the suspect vehicle and the heavy traffic congestion.[23] The officer testified that "he had no intention or expectation of actually overtaking [the suspect] vehicle, the purpose of his pursuit being merely to attempt to keep the vehicle in sight, and to alert other drivers with his siren."[24] The suspect did in fact have an accident at one of the intersections.

The court ruled that the suspect vehicle was already traveling at the high rate of speed prior to contact with the officer and the accident occurred only two blocks from contact with the officer and therefore, the officer was not the proximate cause of the accident.[25] Accordingly, the trial court was correct in granting summary judgment for the officer.

b. *Mixon v. City of Warner Robbins*

In *Mixon v. City of Warner Robbins*[26] decided in 1994, the Georgia Supreme Court held that the evidence would authorize a jury to find that the officer had failed to "act in accordance with his duty under O.C.G.A. 40-6-6(d) to pursue[the suspect] with due regard for the safety of other drivers."[27] In that case, a Warner Robbins police officer observed a suspect vehicle run a stop sign in a residential

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[23]*Sammor*, 176 Ga. App. at 176.

[24]*Sammor*, 176 Ga. App. at 176.

[25]*Sammor*, 176 Ga. App. at 177-78.

[26]264 Ga. 385 (1994), *superseded by statute as stated in City of Winder v. McDougald*, 276 Ga. 866 (2003).

[27]*Mixon*, 264 Ga. at 391.

area. The officer initiated a pursuit and the suspect refused to stop. The officer pursued closely behind the suspect vehicle and the suspect ran a second stop sign and collided with another vehicle driven by the plaintiff, who was killed in the accident.

As the court explained, the evidence showed the following:

> [the officer] observed [the suspect] slow to three-to-five miles per hour before proceeding through a stop sign in a residential area. Thus, even though [the suspect] had committed a traffic violation and apprehension was warranted, the traffic violation had been minor and the risk of serious injury to other drivers had been slight. . . . When [the officer] began his pursuit, [the suspect] did not accede to the show of authority, but increased his speed. In his effort to evade apprehension, [the suspect] ultimately accelerated his vehicle to 55-60 miles per hour, almost twice the posted speed limit. Despite the fact that [the suspect's] original traffic violation had been minor and that his response to [the officer's] pursuit had been to increase his speed and thereby heighten the risk to other drivers, [the officer] nevertheless maintained his pursuit and was 'right up on [the suspect's] bumper' only seconds before [the suspect] crashed into Mrs. Mixon's vehicle.'[28]

Based upon this evidence, a jury could find that the officer had "failed to balance the risk to the safety of other drivers

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[28] *Mixon*, 264 Ga. at 390.

when he persisted in his efforts to arrest [the suspect] for a minor traffic offense even after [the suspect] escalated his flight into a high-speed chase in a residential area."[29] The Georgia Supreme Court ruled that there would be a jury trial in the case on the question of whether the officer acted with due regard for the safety of others.[30]

c. *Wilson v. City of Atlanta*

In *Wilson v. City of Atlanta*[31] decided in 1996, the Georgia Supreme Court concluded that the officer did not drive with reckless disregard for the safety of the public during the pursuit. An Atlanta Police Department officer heard a "fight/snatch thief" report over his radio, which gave the license plate number and description of the occupants in the vehicle.[32] The officer observed the suspect vehicle approximately twenty minutes later and followed the vehicle at normal speeds until it " 'dramatically increased' its speed as it approached an intersection."[33] The officer activated his blue lights and siren and radioed an emergency call, which activated other units and a helicopter. During the chase, the officer observed the suspect vehicle fail to stop for red lights and stop signs and drive the wrong way down a one-way street. While the traffic was medium to light, the officer pursued, but slowed as he passed through intersections. When traffic became medium to heavy, he discontinued the

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[29] *Mixon*, 264 Ga. at 391.

[30] *Mixon*, 264 Ga. at 391.

[31] 223 Ga. App. 144 (1996).

[32] *Wilson*, 223 Ga. App. at 146.

[33] *Wilson*, 223 Ga. App. at 147.

pursuit and resumed normal speed while maintaining visual contact.[34]

After discontinuing the pursuit, he observed the suspect vehicle swerve left of the double yellow centerline and crash head on into the plaintiff's vehicle. The officer testified that "at all times during [the] pursuit . . . he balanced the risk to the safety of other drivers and acted accordingly."[35] During the entire pursuit, he never "followed the suspects so closely that his "vehicle was right up on the suspects' vehicle's bumper.' "

The court found that the officer was responding to a call of violent criminal activity and had received a fairly positive identification of the vehicle and description of occupants before he observed the suspect vehicle.[36] The officer initiated a pursuit, but it did not escalate into a high-speed pursuit for several blocks. Only when the suspect vehicle's speed dramatically increased did the officer activate his emergency lights and sirens. Unlike the officer in *Mixon v. City of Warner Robbins,* the officer did not follow the suspect vehicle so closely as to be "on its bumper," but instead slowed at intersections and at all times monitored the traffic conditions.[37] The court ruled that the officer did not act with reckless disregard for the safety of others but instead "balanced the risks involved in his pursuit of the [suspect]

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[34] *Wilson*, 223 Ga. App. at 147.

[35] *Wilson*, 223 Ga. App. at 147.

[36] *Wilson*, 223 Ga. App. at 147.

[37] *Wilson*, 223 Ga. App. at 147.

vehicle.[38] For these reasons the court affirmed the trial court's grant of summary judgment for the officer.

d. Defenses to Negligence Actions

When an officer and his agency are sued in a negligence action, there are several defenses that may be asserted. This section will discuss three defenses: (1) O.C.G.A. § 40-6-6(d) which provides that the officer's actions in certain cases were not the proximate cause of the injury; (2) official immunity; (3) sovereign immunity.

(1) O.C.G.A. § 40-6-6(d)

After the Georgia Supreme Court decided *Mixon v. City of Warner Robbins*, the General Assembly modified O.C.G.A. § 40-6-6 and added subsection (d)(2).[39] It provides the following:

> When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect *unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit.* Where such reckless

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[38] *Wilson*, 223 Ga. App. at 148.

[39] *Wilson*, 223 Ga. App. 144, 148 n.2 (1996).

> disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.[40]

Subsection (d)(1), which requires the officer to "drive with due regard for the safety of all persons," still remains in O.C.G.A. § 40-6-6.[41] With the addition of subsection (d)(2), officers have a defense in cases where the fleeing suspect injures another person as long as the officer did not act with "reckless disregard for proper law enforcement procedures."[42]

In a 2003 decision in the case of *City of Winder v. McDougald,*[43] the Georgia Supreme Court considered the issue of whether this section applies when it is the fleeing suspect who is injured or killed. A fourteen year-old girl took her father's car without permission and was driving through the City of Winder at approximately 4:40 a.m. with no headlights illuminated.[44] An officer observed the vehicle traveling without lights and turned on his blue lights to make a traffic stop of the vehicle. The driver did not stop. The officer then turned on his siren and the driver "sped away."[45] As the pursuing officer followed, the driver increased her

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[40]O.C.G.A. § 40-6-6(d)(2) (emphasis added).

[41]O.C.G.A. § 40-6-6(d)(1).

[42]O.C.G.A. § 40-6-6(d)(2).

[43]276 Ga. 866.

[44]*McDougald*, 276 Ga. at 866.

[45]*McDougald*, 276 Ga. at 866.

speed, lost control of the car, and crashed into a utility pole. The driver was killed.

The Georgia Supreme Court considered whether O.C.G.A. §40-6-6(d)(2) should apply to this case. The court explained that this statute was amended by the legislature in 1995 in order to "limit liability when a fleeing suspect injures an innocent person" – those cases when an officer is pursuing a suspect and the suspect hits an innocent person who is simply driving down the road.[46] In such cases, the officer is not liable for the suspect's actions unless the officer acted with reckless disregard. Although the statute does not specifically address injuries or death to the fleeing suspect, the court concluded that the legislature intended it to apply in such cases.[47] As a result of this ruling, there was no trial in the case. The Supreme Court reminded law enforcement again that while it may be "desirable" that the officer apprehend a criminal, " 'it is equally as important that innocent persons, whether or not connected with the emergency to be met, not be maimed or killed in the operation.' "[48]

Additionally, it should be noted that the defense provided by O.C.G.A. § 40-6-6(d)(2), namely that the officer's actions in pursuing were not the proximate cause of the injury, will *not* apply when the officer is acting 'with reckless disregard for proper law enforcement procedures."[49]

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[46] *McDougald*, 276 Ga. at 867.

[47] *McDougald*, 276 Ga. at 868.

[48] *McDougald*, 276 Ga. at 867 (quoting *Archer v. Johnson*, 90 Ga. App. 418, 424 (1954)).

[49] O.C.G.A. § 40-6-6(d)(2).

(2) Official Immunity

Georgia law enforcement officers may also be given official immunity for engaging in the discretionary function of pursuing a fleeing violator so long as the officer does not act with "actual malice or with actual intent to cause injury."[50] The determination of whether the officer is entitled to the official immunity should be made before there is any determination of whether the officer was acting with "reckless disregard for proper law enforcement procedures" within the meaning of O.C.G.A. § 40-6-6(d)(2).[51] In *Cameron v. Lang,*[52] the Georgia Supreme Court explained the reasoning for official immunity as follows:

> The doctrine of official immunity, also known as qualified immunity, offers public officers and employees limited protection from suit in their personal capacity. Qualified immunity 'protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without wilfulness, malice, or corruption.' Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or an intent to injure. The rationale for this immunity is to preserve the public employee's independence of action without fear of

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[50] *Hanse v. Phillips,* 276 Ga. App. 558 (2005), *cert. granted,* 2006 Ga. LEXIS 214 (March 27, 2006).

[51] *Cameron v. Lang,* 274 Ga. 122, 124 (2001).

[52] 274 Ga. 122 (2001).

> lawsuits and to prevent a review of his or her judgment in hindsight. This protection is particularly important in the context of a high speed pursuit where police officers must make a split-second decision on whether to initiate the pursuit or continue it and the type of risks to take.[53]

Cameron v. Lang involved a vehicle pursuit by Deputy Cameron of a fleeing felon who crossed the centerline during the pursuit and struck the Lang's car, killing Mr. Lang.[54] The Georgia Supreme Court concluded that the officer's decision to engage in a high speed pursuit of a suspected felon was a discretionary decision.[55] Additionally the court found that there was no evidence that the deputy "acted with malice or an intent to injure in initiating or continuing the high speed chase."[56]

Of course, it is important to remember that official immunity applies only to the claim against the individual officer and does not apply to the claim against the municipality that employs the officer.

(3) Sovereign Immunity

The suit against the officer in his official capacity is in

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[53]*Cameron*, 274 Ga. at 123.

[54]*Cameron*, 274 Ga. at 122-23.

[55]*Cameron*, 274 Ga. at 125.

[56]*Cameron*, 274 Ga. at 125.

reality a suit against the agency that employs the officer.[57] The governmental entity, whether it is a city, county or state, may have sovereign immunity. For example, Georgia State Patrol troopers who engage in a pursuit to apprehend a traffic violator are "providing law enforcement" and are immune from suit.[58]

Additionally by statute, city and counties are liable for damages arising from the use of a motor vehicle only if they purchase liability insurance and that liability is limited to the amount of insurance purchased.[59]

The presence or absence of immunities, however, should not be considered when deciding what policy to promulgate regarding pursuits. Even when the law provides immunity, the safety of the public should always be considered in weighing the risks inherent in pursuing or in allowing the fleeing violator to escape.

2. 42 U.S.C. 1983 Lawsuits

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[57] *Cameron*, 274 Ga. at 125.

[58] *See Blackston v. Georgia State Patrol*, 274 Ga. App. 373, 374 (2005). In a case involving fire protection decided on June 26, 2006, the Georgia Supreme Court held that the exception to the waiver of sovereign immunity for "providing law enforcement" found in OCGA § 50-21-24 (6) authorizes "the application of sovereign immunity to the making of policy decisions by state employees and officers . . . and to the acts and omissions of state employees and officers executing and implementing those policies." *Georgia Forestry Comm'n v. Canady*, 2006 Ga. LEXIS 461 *14 (June 26, 2006). It is unknown whether this ruling will affect the well-settled law of *Blackston v. Georgia State Patrol* regarding the "providing law enforcement" exception as applied to pursuits by the Georgia State Patrol; however it seems unlikely that it will, as pursuits are the "execution" of a policy decision.

[59] *Cameron*, 274 Ga. at 126 (discussing O.C.G.A. § 33-24-51).

In addition to negligence lawsuits, a lawsuit pursuant to 42 U.S.C. 1983 ("Section 1983") may arise out of a police pursuit. Section 1983 allows a citizen to bring a lawsuit against a police officer for a violation of the citizen's constitutional rights. There are two types of Section 1983 suits: (1) those where the injury occurred by accident; and (2) those where the officer intentionally makes contact with the fleeing violator's vehicle.

In cases when the officer accidentally makes contact with the suspect or the suspect's vehicle, the claim is brought pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and is unlikely to succeed. In 1998 in the case of *County of Sacramento v. Lewis*,[60] the United States Supreme Court considered whether an accident between a deputy and a motorcycle passenger resulting in death to the passenger would violate the Due Process Clause of the Fourteenth Amendment.[61]

The deputy responded to a fight call and was returning to his car after handling the call when he observed a motorcycle with two people approaching at a high rate of speed. The deputy attempted to stop the motorcycle by turning on his lights and yelling at the boys to stop. The motorcycle maneuvered between the police cars and sped off. The pursuit was described as follows:

> For over 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming

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[60]523 U.S. 833 (1998).

[61]The Due Process Clause states that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." *Lewis*, 523 U.S. at 840 (quoting U.S. CONST., Amend. 14, § 1).

> traffic, forcing two cars and a bicycle to swerve off the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with [the deputy] following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop.
>
> The chase ended after the motorcycle tipped over as Willard tried a sharp left turn. By the time [the deputy] slammed on his breaks, [the driver] was out of the way but [the passenger] Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. Lewis was pronounced dead at the scene.[62]

In the lawsuit, Lewis' family argued that the deputy violated Lewis' Fourteenth Amendment right to due process by causing his death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspect. The Supreme Court disagreed and held that the Due Process Clause is only violated when there is arbitrary conduct that shocks the conscience.[63] The Court explained that "a police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders."[64] The Court concluded that there was

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[62] *Lewis*, 523 U.S. at 837.

[63] *Lewis*, 523 U.S. at 846.

[64] *Lewis*, 523 U.S. at 853.

no intent by the deputy to cause physical harm to Lewis and consequently no violation of his due process rights.[65] Significantly, however, the Court noted that its finding of constitutional violation did not imply anything about the appropriate treatment of this case under state negligence law.[66]

As the standard for a Due Process Clause violation is so high, it is unlikely that there will be a successful claim if the injuries occur due to an accident.[67] There is, however, another type of constitutional claim that may be brought pursuant to Section 1983. A Fourth Amendment claim may be brought when an officer intentionally makes contact with a suspect vehicle by ramming the vehicle or using a dead man's roadblock.

In Brower v. County of Inyo[68] decided in 1989, the United States Supreme Court considered a case involving what has been described as a "deadman roadblock."[69] Police had chased a stolen vehicle at high speeds for approximately 20 miles.[70] The driver Brower was killed when he crashed into a

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[65]*Lewis*, 523 U.S. at 853-54.

[66]*Lewis*, 523 U.S. at 854.

[67]*See White v. Polk County*, 2006 U.S. Dist. LEXIS 22060 *16 (April 21, 2006) ("Defendants cite numerous cases in their memorandum for the proposition that rarely, if ever, does a high-speed chase shock the judicial conscience in the constitutional sense.").

[68]489 U.S. 593 (1989).

[69]*Harris v. Coweta County, Georgia*, 433 F.3d 807, 812 (11th Cir. 2005).

[70]*Brower*, 489 U.S. at 594.

police roadblock. The roadblock was an 18-wheel tractor-trailer placed across both lanes of the two-lane highway in the path of Brower's flight.[71] The roadblock was "'effectively concealed' by placing it behind a curve and leaving it unilluminated, and . . . position[ing] a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be 'blinded' on his approach."[72]

The Court first held that the placement of this particular roadblock which was designed to produce a stop by physical impact if voluntary compliance did not occur was a seizure within the meaning of the Fourth Amendment.[73] A seizure is "a governmental termination of freedom of movement through means intentionally applied."[74] "Brower was meant to be stopped by the physical obstacle of the roadblock – and . . . was so stopped."[75] The next question will be whether the seizure was reasonable because the Fourth Amendment only prohibits "unreasonable" seizures. The Court held that a jury may conclude that the circumstances of the roadblock, particularly the use of headlights to blind Brower, resulted in an unreasonable seizure in violation of the Fourth Amendment.[76]

Brower is the first United States Supreme Court case

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[71] *Brower*, 489 U.S. at 594.

[72] *Brower*, 489 U.S. at 594.

[73] *Brower*, 489 U.S. at 598-99.

[74] *Brower*, 489 U.S. at 597.

[75] *Brower*, 489 U.S. at 599.

[76] *Brower*, 489 U.S. at 599.

involving a pursuit. It teaches that a roadblock may be an unreasonable seizure in violation of the Fourth Amendment when officers set up the roadblock in such manner that it is likely to kill the driver. Accordingly, a roadblock must be set up in a reasonable manner, such as a roadblock at the end of a long straightaway that gives the driver the option of stopping.[77]

The United States Supreme Court has not yet decided a case involving a ramming of a suspect's car during a pursuit. The United States Court of Appeals for the Eleventh Circuit, which covers Georgia, Florida and Alabama, however, has decided such a case. In 2005, the Eleventh Circuit decided the case of Harris v. Coweta County, Georgia.[78] A Coweta County Sheriff's Department deputy clocked Harris traveling at 73 mph in a 55 mph zone.[79] The deputy pursued and Harris fled. Harris traveled at speeds between 70-90 mph, passed vehicles on double yellow control lanes, and ran two red lights. The deputy was able to obtain a tag number on the suspect vehicle at the beginning of the pursuit. After requesting permission from a supervisor to perform the PIT ("Precision Immobilization Technique"), another deputy who had joined the pursuit determined that Harris was traveling too fast for the maneuver.[80] The deputy then rammed Harris' vehicle, causing the vehicle to crash and

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[77] *Brower*, 489 U.S. at 598 (distinguishing between roadblock "designed to give the oncoming driver the option of a voluntary stop (e.g., one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (e.g., one located just around a bend)").

[78] 433 F.3d 807 (11th Cir. 2005).

[79] *Harris*, 433 F.3d at 810.

[80] *Harris*, 433 F.3d at 810-11.

leaving Harris a quadriplegic.[81] At the time, the county's pursuit policy stated that "deliberate physical contact between vehicles at anytime may be justified to terminate the pursuit upon the approval of the supervisor."[82] Additionally the pursuing deputy was not trained to perform the PIT.[83]

The court first determined that the ramming by the deputy was a seizure. Citing *Brower*, the court found that "using a vehicle to stop and apprehend a suspect is a seizure."[84] Next the court considered whether the use of the vehicle was deadly force. The court concluded that this was deadly force. It reasoned:

'Deadly force' is force that creates 'a substantial risk of causing death or serious bodily injury.' . . . Like other instrumentalities, the use of an automobile cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately to cause death or serious bodily injury. . . . Under an objective view of the facts of this case, there is little dispute that the ramming of Harris' car could constitute a use of 'deadly force' and that a jury could so reasonably conclude.[85]

As the use of the automobile to ram the Harris' car was deadly force, the next question was whether it was a reasonable use of deadly force. According to *Tennessee v.*

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[81] *Harris*, 433 F.3d at 811.

[82] *Harris*, 433 F.3d at 810 n2.

[83] *Harris*, 433 F.3d at 810-11.

[84] *Harris*, 433 F.3d at 812.

[85] *Harris*, 433 F.3d at 821.

Garner, deadly force may be authorized in two limited circumstances:

(1) 'where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others,' or 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm,' and (2) if deadly force is 'necessary to prevent escape,' and, (3) 'if, where feasible, some warning has been given.'[86]

The court found that none of these conditions were present to justify the use of deadly force. It reasoned as follows:

> 'Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite 'crime involving the infliction or threatened infliction of serious physical harm.' Indeed neither [the deputy who rammed Harris] nor [the supervisor] had any idea why Harris was being pursued. The use of deadly force is not 'reasonable' in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest. The Garner Court specifically recognized that it would be

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[86]*Harris*, 433 F.3d at 813 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985)).

> an anomaly to transform 'every fleeing misdemeanant into a fleeing felon . . . solely by virtue of his flight.' A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the 'substantial threat' of imminent physical harm that Garner requires before deadly force can be used.[87]

The court also concluded that the deputy who rammed Harris was not entitled to qualified immunity because he had fair warning from prior decisions that the use of deadly force in this case was unconstitutional.[88]

With regard to the supervisor who had authorized the use of the PIT maneuver, the court concluded that he was entitled to summary judgment because he did not authorize deadly force.[89] The evidence submitted to the court regarding the PIT maneuver was that it was "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." The court pointed out that this assumes that "the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight 'safely.' "[90] In assuming that the PIT maneuver can only be executed at "lower speeds," the Eleventh Circuit did not have the benefit of the research conducted by the Georgia Institute of Technology and discussed infra that indicates that the PIT maneuver can be

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[87] *Harris*, 433 F.3d at 815 (citations omitted).

[88] *Harris*, 433 F.3d at 820-21.

[89] *Harris*, 433 F.3d at 817.

[90] *Harris*, 433 F.3d at 817.

safely executed at higher speeds.

In sum, *Harris v. Coweta County* stands for the proposition that intentional ramming of a fleeing violator is the use of deadly force. The use of deadly force may be objectively reasonable under the specific facts and circumstances; however, the officer should only use deadly force when it is authorized by the standard set forth in *Tennessee v. Garner*. The *Harris* case does identify examples of cases where suspects have used their vehicles in such a manner as to make the vehicle a deadly weapon. For example, courts have authorized the use of deadly force when suspects have:

> (1) used an automobile to "run down an officer;"[91]
>
> (2) used the automobile to "ram, run over, side-swipe, or swerve" into officers;[92] or
>
> (3) intentionally driven "head-on" into the officer's vehicle.[93]

In such cases, the courts have concluded that the use of deadly force in the form of ramming a suspect's vehicle or discharging a firearm at the suspect was objectively reasonable under the circumstances.

IV. Policy Considerations

Every Georgia law enforcement agency that operates

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[91] *Harris*, 433 F.3d at 814.

[92] *Harris*, 433 F.3d at 816 n.11.

[93] *Harris*, 433 F.3d at 814.

vehicles with emergency equipment (blue lights and siren), regardless of its mission, should have a policy regarding pursuits. The need for good, sound policies and procedures is important in any organization. Promulgating policies provides a map for employees to follow, provides management the authority to oversee operations, and enhances the operations of any organization. This need is critical for law enforcement agencies, because by the very nature of the profession, the ability to harm others and take a human life constantly exists.

Each agency's pursuit policy will vary depending upon its mission, size, location and jurisdiction. For these reasons, the Committee is not recommending a statewide pursuit policy. A statewide pursuit policy would not take into account the disparity in missions of municipal, county and state police agencies.

When preparing the agency policy, however, there are some areas that should be addressed in every pursuit policy. These areas include (1) definition of terms; (2) initiation of pursuits; (3) pursuit procedures; (4) ending the pursuit; (5) review of pursuits; and (6) training. It is important to recognize that the determination of what policy to implement in each of these areas is a decision for each agency to make based upon its size, mission and location. The information that the Committee is providing in each area is to assist the agency in crafting its pursuit policy. As the International Association of Chiefs of Police states in its model policy entitled "Vehicular Pursuit":

> the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies;

> and the impact of varied agency resource capabilities, among other factors.[94]

With this guidance in mind and after reviewing Georgia law regarding pursuits, the Committee makes the following recommendations.

A. Definitions

The Committee recommends that the policy include a "Definitions" section to define key words. Definition of key words adds clarity to the document and ensures that the document as a whole is understood. Key words that may be defined, if used, include: (1) vehicle pursuit; (2) authorized law enforcement vehicle; (3) primary unit; (4) secondary unit; (5) inter-jurisdictional pursuits; (6) discontinue the pursuit; and (7) terminate the pursuit. Suggested definitions are as follows:

> Vehicle Pursuit: an active attempt by a law enforcement officer operating an authorized law enforcement vehicle to apprehend a fleeing suspect who is actively attempting to elude the police.[95]

> Authorized law enforcement vehicle: a motor vehicle belonging to a federal, state, or local law enforcement agency with a functioning audible signal and a functioning flashing or

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[94]International Association of Chiefs of Police Model Policy (hereinafter "IACP Model Policy"), Vehicular Pursuit, Oct. 1996 retrieved from http://www.theiacp.org/pubinfo/PolCtr on May 23, 2006.

[95]IACP Model Policy at 1.

revolving blue light.[96]

Primary unit: The authorized law enforcement vehicle that initiates a pursuit or any other unit, which assumes control of the pursuit.[97]

Secondary unit(s): Any authorized law enforcement vehicle that becomes involved as a backup to the primary unit and follows the primary unit at a safe distance.[98]

Inter-jurisdictional pursuit: Any vehicle pursuit that crosses into a neighboring jurisdiction, such as across the municipal, county or state line.

Discontinue the pursuit: the law enforcement officer ends his involvement in the pursuit by slowing down to the posted speed limit and turning off emergency lights and siren.

Terminate the pursuit: stopping a suspect vehicle by the use of intervention methods, such as [*Include Only Those Methods That Your Officers Have Received Training And/Or Have The Equipment To Utilize*] tire deflation devices (stop sticks), roadblocks, ramming, PIT maneuver, to stop the continued movement of the suspect vehicle.

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[96]O.C.G.A. § § 40-1-1 and 40-6-6.

[97]IACP Model Policy at 2.

[98]IACP Model Policy at 2.

In addition to these suggested definitions, policymakers should consider defining the intervention methods that the agency authorizes for terminating a pursuit. For example, if the agency authorizes the use of the PIT maneuver, then the term should be defined.[99] The definition of these key words and any other words used throughout the policy will assist officers in understanding and complying with the pursuit policy.

B. Initiation of Pursuit

First and foremost, policymakers should consider when a pursuit is authorized. Georgia law does not state when pursuits are authorized nor does it require officers to pursue. If an officer chooses to pursue, Georgia law requires that law enforcement officers drive with due regard for the safety of the public during the pursuit. Accordingly, the policy should address specific risks inherent in the pursuit and require the officer to weigh those risks as applied to the current situation. The officer will have to make the decision whether to pursue in a matter of seconds, so the policy must provide clear guidance.

1. Authorized Pursuits

At the outset of the pursuit policy, officers must be told when the agency authorizes the pursuit of a fleeing suspect. As discussed, each agency's policy will be different depending on variables such as its mission, size and location. Police pursuit policies may be either restrictive or judgmental as to the officer's authorization to pursue. Restrictive policies are those where "the officer may only

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[99]This paper will define the term "PIT maneuver" in Section V *infra*.

pursue given the existence of certain well-defined criteria."[100] Judgmental, or discretionary, policies are those "where the officer may decide whether or not to pursue based upon certain factors."[101]

Policymakers should first determine whether a restrictive or judgmental policy is appropriate for their agency. Municipal police agencies may choose to have a restrictive policy because their jurisdiction is primarily urban and suburban. Studies have shown that "municipal agencies, for example, were significantly more likely to restrict pursuits to felony incidents (19 percent) than were their county counterparts (11 percent)."[102] Whereas many county or state police agencies may choose to have a judgmental policy due to the type of roadways in their jurisdiction (many highways and interstates to patrol) and their mission. It is important to recognize that a judgmental policy still requires the officer to determine whether the danger to the public from the pursuit outweighs the benefits of the pursuit.

In considering a restrictive policy, the simplest way to make the decision about which pursuits will be authorized is to formulate the policy in terms of the nature of the charges and the driver's current behavior in relationship to the danger it creates to the public. Officers are familiar with the difference between a minor traffic violations, serious traffic violations, misdemeanor and felony offenses. Taking into account the

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[100]Pipes, Chris and Dominick Pape, *Police Pursuits and Civil Liability,* FBI LAW ENFORCEMENT BULLETIN, 16, 17 (Jul. 2001).

[101]Pipes et al. at 17.

[102]Kenney, Dennis J. and Geoffrey P. Alpert, *A National Survey of Pursuits and the Use of Police Force: Data from Law Enforcement Agencies,* 25 *J. Crim. Just.* 315, 320 (1997).

nature of the agency's mission and jurisdiction, the policymaker should carefully consider the following questions:

> Should the agency permit pursuits for minor traffic violations such as failure to stop for a stop sign?
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> Should the agency permit pursuits for serious traffic violations such as driving while impaired or speeding in excess of 15 miles per hour over the posted speed limit?
>
> Should the agency permit pursuits for misdemeanor offenses?
>
> Should the agency allow pursuits for felony offenses?
>
> Should the agency allow pursuits for serious felony offenses and/or forcible felonies?
>
> Should the agency allow pursuits when the violator has created a danger to the public that warrants immediate action in the form of a pursuit?
>
> Should the agency allow a pursuit when, prior to any law enforcement contact, the violator is already operating a motor vehicle in a hazardous manner and the violator's hazardous driving presents a continuing significant threat to the safety of the public?

Once the policymaker has considered these questions, the restrictive pursuit policy should provide the answers to these

questions. As this is probably the most crucial part of pursuit policy formation, the Committee will provide three examples of restrictive pursuit policy language that addresses which pursuits are authorized by the agency. It is important to recognize that these agencies are policing in primarily urban and suburban areas. And as stated, each policymaker should create policy based upon their agency's unique characteristics.

Valdosta Police Department is responsible for providing law enforcement to the City of Valdosta, Georgia. The Police Department consists of 132 sworn personnel, 21 non-sworn support personnel and 18 part-time employees. The 104 members of the Patrol Bureau are responsible for the initial response to calls for service from the 50,000 citizens of Valdosta. This bureau is also responsible for the Traffic Unit, Power Squad, the Special Response Team, and the K-9 Unit.[103] Their pursuit policy permits the initiation of a pursuit in the following circumstances:

> Valdosta Police Department General Order 200-41
>
> 7. Nature of charges – Officers may initiate a vehicle pursuit under the following circumstances:
>
> a. For person (s) suspected of a forcibly felony or when an officer has articulable reasonable suspicion or probable cause that an extraordinary danger exists that warrants immediate

[103]Retrieved from http://www.valdostacity.com/CityDepartments/index.cfm?Fuseaction=Police on May 23, 2006.

action and necessitates a vehicle pursuit or;

b. Prior to any police contact, the officer observes that the person is driving or operating a motor vehicle or motorcycle in a hazardous manner and that person's hazardous driving presents a significant threat to the safety of others.

Officers will not normally pursue for misdemeanors or minor traffic violations, unless such violations meet the criteria as specified in (7.b.) above.[104]

Gwinnett County Police Department is responsible for providing law enforcement in Gwinnett County, Georgia. Gwinnett County is one of several counties that comprise the Metropolitan Atlanta area. It is primarily an urban/suburban county with both business and residential areas. Gwinnett County also has several incorporated cities within its boundaries, many of which have their own police department. Gwinnett County Police Department has 662 sworn officers. Gwinnett County Police Department permits pursuits under the following circumstances:

Gwinnett County Police Department Directive 426.00

Vehicular pursuits are prohibited unless there is probable cause to believe that the person(s) being pursued have committed or are

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[104]Valdosta Police Department General Order 200-41 at 2 (rev'd 01-01-06) (copy attached at Appendix C).

committing the following:

1. Murder, armed robbery, rape, kidnapping and aggravated battery; or

2. Any action that creates an immediate threat of death or serious bodily injury to another person or a substantial threat to the safety of another person.[105]

The Atlanta Police Department is the largest police department in Georgia with approximately 1,700 sworn officers. It is responsible for policing the City of Atlanta, which is an urban/suburban environment with a population of 420,000 people. The Atlanta Police Department Policy regarding pursuits authorizes pursuits only in the following circumstances.

> Atlanta Police Department SOP 3050 Pursuit Policy
>
> The following two conditions must be met before a police officer can engage in a vehicle pursuit.
>
> 4.1.1 First, the vehicles of the primary and secondary pursuit units must comply with the three applicable state codes of Georgia regarding the equipment of law enforcement vehicles. The codes are 40-8-90 (Use of flashing or revolving blue lights), 40-8-91

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[105]Gwinnett County Police Department General Order 426.00 at 1 (Sept. 24, 2006) (copy attached at Appendix D).

(Marking of official vehicles), and 40-8-94 (Sirens, whistles, and bells). In addition, the driver of the authorized emergency vehicle must drive with due regard for the safety of all persons as described in Georgia code 40-6-6 (Authorized emergency vehicles). (CALEA 41.2.2d)

4.1.2 Second, the driver of the fleeing vehicle or a passenger in the fleeing vehicle must meet one of the three following standards set forth in O.C.G.A. 17- 4-20 (Arrest Without a Warrant).

1. "The suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury."

2. "When the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others."

3. "When there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm." (CALEA 1.3.2)[106]

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[106]Atlanta Police Department SOP 3050 Pursuit Policy at 3 (Aug. 18, 2004) (copy attached at Appendix E).

As mentioned, these sample policies are from agencies that police in primarily urban and suburban environments. In narrowly circumscribing what offender behavior justifies a pursuit, the policymakers are recognizing that the need to apprehend the offender does not usually outweigh the inherent risks of a pursuit in such an environment.

The International Association of Chiefs of Police Model Policy entitled "Vehicular Pursuit" best exemplifies a judgmental policy. In the section entitled "Initiation of Pursuit," it states:

> 1. The decision to initiate pursuit must be based on the pursuing officer's conclusion that the immediate danger to the officer and the public created by the pursuit is less than the immediate or potential danger to the public should the suspect remain at large.
>
> 2. Any law enforcement officer in an authorized emergency vehicle may initiate a vehicular pursuit when the suspect exhibits the intention to avoid apprehension by refusing to stop when properly directed to do so. Pursuit may also be justified if the officer reasonably believes that the suspect, if allowed to flee, would present a danger to human life or cause serious injury.
>
> 3. In deciding whether to initiate pursuit, the officer shall take into consideration:
>
> a. road, weather and environmental conditions;
> b. population density and vehicular and pedestrian traffic;

c. The relative performance capabilities of the pursuit vehicle and the vehicle being pursued;
d. The seriousness of the offense; and
e. The presence of other persons in the police vehicle.[107]

It is important to recognize that a judgmental policy does not mean that officers will always initiate the pursuit or, conversely, will never discontinue the pursuit. The essence of a judgmental policy is that the officer at all times – prior to initiation and during the pursuit, weighs the risks of the pursuit versus the danger to the public in allowing the suspect to remain at large. Such a policy is particularly appropriate for agencies that must patrol the state's interstates and highways,[108] such as state police agencies, sheriff's departments and those municipal agencies with interstates running through their jurisdictions.

2. Factors to Consider When Pursuit is Authorized

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[107]IACP Model Policy at 2.

[108]Implicit in patrol of the interstates and highways is the need to apprehend suspects who present a grave danger to the public through their actions, but have not committed a felony. There are three crimes in Georgia that are only misdemeanor offenses, yet by definition present a danger to the public. For example, drag racing and reckless driving are only misdemeanor crimes in Georgia. *See* O.C.G.A. §§ 40-6-186 and 40-6-390. Another crime presenting a danger to the public is aggressive driving, which is defined as operating "any motor vehicle with the intent to annoy, harass, molest, intimidate, injure, or obstruct another person." O.C.G.A. § 40-6-397. Aggressive driving is also classified as a misdemeanor – although of a high and aggravated nature. To promulgate a restrictive pursuit policy that would prohibit pursuit for these types of misdemeanor traffic violations where the driver's actions are creating a great danger to the public prior to the initiation of the pursuit would ultimately result in less safe roads in Georgia.

It may be that a pursuit is authorized under the policy but due to the current factors or conditions, it is not safe to pursue. A pursuit may create an even greater danger to the public than that posed by the violator being allowed to escape. The Atlanta Police Department policy frames it this way: "Once the two required conditions exist, other factors that need to be considered in order to initiate a vehicle pursuit or allow a vehicle pursuit to continue are"[109] and then lists the other factors. Reviewing this policy and others, this is a list of other factors to consider in determining whether to initiate a pursuit:

> Volume of traffic – both vehicular and pedestrian;
> Location of pursuit – urban, suburban or rural area;
> Driving abilities of the police officer;
> Condition of the authorized emergency vehicle;
> Weather conditions;
> Road surface conditions – contours of road, construction zones, poor road conditions, and narrow roads may affect vehicle performance at high speeds;
> Speeds involved;
> Divided highways and vehicles traveling the wrong way on divided highways.

In addition to considering these factors in deciding whether to initiate a pursuit, the policy should direct the officer and/or supervisor to keep these considerations in mind during the entire pursuit. It may be that conditions change

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[109]Atlanta Police Department SOP 3050 Pursuit Policy at 4.

and make the continuation of the pursuit too dangerous.[110]

The decision to initiate a pursuit will be made in seconds. The pursuit policy, however, will be carefully considered by policymakers who weigh the risks of the pursuit versus the danger to the public from the suspect remaining at large. Addressing which pursuits are authorized in the policy permits policymakers the opportunity to train officers. Additionally, it provides the means to address policy violations through training and/or appropriate disciplinary action.

C. Pursuit Procedures

When developing the pursuit policy, the agency should consider the roles and responsibilities of all enforcement and non-enforcement personnel involved during the pursuit. The policy should provide for clear communications to ensure that resources are deployed to control and minimize danger to others and also to allow officers and their supervisors to make the best decisions possible from that information.

1. Responsibilities of the Primary Unit, Communications, Secondary Unit and Supervisor

The policy should address the responsibilities of the primary unit, communications secondary unit(s) and the supervisors. When a vehicle pursuit is initiated, the primary unit should immediately activate his emergency lights and siren. During the pursuit, the primary unit should report the following

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[110]Recall *Wilson v. City of Atlanta* where the officer discontinued the pursuit and slowed to normal speeds when the traffic became heavier. 223 Ga. App. 144, 147 (1996). The court granted summary judgment to the officer and concluded that the officer did not act with reckless disregard for the safety of others.

information to the dispatcher and/or supervisory personnel:

a. Unit number and the fact that he is in pursuit;
b. The location and direction of travel;
c. Description of the vehicle (make, color, tag #, etc.) and occupants (race, sex, number, etc.);
d. Reason for the pursuit;
e. Changes in location and direction of travel during the pursuit; and
f. Location at the time the pursuit is discontinued.

Once notified of the pursuit, the dispatcher should:

a. Record all information received from the pursuing officer;
b. Convey relevant information to the Shift Supervisor and responding units;
c. Advise all units to clear the radio for emergency traffic only;
d. Conduct an inquiry of the license plate number through the N.C.I.C. and G.C.I.C. computer systems;
e. Notify adjacent jurisdictions of the pursuit and the potential for the pursuit entering their jurisdiction; and
f. Monitor the pursuit via radio transmissions.

Upon notification of the pursuit, the supervisor should consider the following:

a. Asserting control over the pursuit and the discretion to order specific units into or out of the pursuit;

b. Controlling which and how many (back-up) units enter into an active pursuit;
c. Ordering field units to clear intersections in the likely path of the pursuit;
d. Authorizing termination of the pursuit by approved methods; and
e. Discontinuing the pursuit any time the risks of the pursuit outweigh the danger to the public from the suspect remaining at large.

With regard to secondary units, the policy should address how many secondary units are authorized to assist. It may be that the policy only authorizes one secondary unit to operate with emergency equipment and provide for the other units to follow at a safe distance in compliance with the traffic laws. Consideration should be given to avoiding numerous police vehicles operating in the emergency mode; however, there is also a need to have secondary units to provide assistance to the primary unit. Secondary units authorized to participate in the pursuit should have their emergency equipment operating. The policy may want to limit the involvement of unmarked units during pursuits where a marked unit is available to take over the pursuit. Another possible utilization of the secondary unit is for that unit to handle the radio traffic to permit the primary unit to concentrate on pursuing the suspect vehicle.

2. Inter-jurisdictional Pursuits

The pursuit policy also should address inter-jurisdictional pursuits in two contexts: (1) a pursuit initiated by the agency that goes into another jurisdiction; and (2) a pursuit initiated by another agency entering and/or leaving the agency's jurisdiction. With regard to the pursuits entering the agency's jurisdiction, the policy should address the following:

a. Provide guidance regarding the role the agency will play the pursuit;
b. Address whether officers may become involved in an inter-jurisdictional pursuit;
c. Provide guidance about whether officers, if permitted to join the interjurisdictional pursuit, may continue to assist with the pursuit after it has left the agency jurisdiction, to include crossing state lines;
d. Supervisory oversight of involvement in the inter-jurisdictional pursuit;
e. Responsibility for notifying neighboring jurisdictions and requesting their assistance; and
f. Providing guidance regarding turning over the lead of the pursuit or the pursuit in its entirety to another jurisdiction such as the Georgia State Patrol or the agency having primary jurisdiction.

By outlining the procedures to follow during a pursuit, the policy ensures that the minimal number of officers will be involved in the pursuit and also defines the actions that should occur once the pursuit leaves a particular jurisdiction. This allows for better management and control of the pursuit from beginning to the end. And with all policy recommendations, addressing it on the front end allows for training of all officers prior to the pursuit.

3. Unmarked Vehicles

The policy should also address whether unmarked vehicles may participate in the pursuit. An unmarked car will not be as visible to other members of the public, although it must have the emergency equipment required by law to be used in a pursuit. Therefore it may be wise to limit the use of

unmarked cars to serious felonies. For example, the City of LaGrange Police Department Policy 12.11 states:

> Emergency Operation of Vehicles During Pursuits
>
> 1. Only marked vehicles with roof-mounted emergency light systems should engage in a pursuit.
>
> 2. Police vehicles that are slick top, but are equipped with intersection lights, and have all the police markings on the sides and back of the police vehicle are allowed to be involved in pursuits.
>
> 3. Unmarked vehicles will not become involved in any pursuit unless it involves a serious felony. No unmarked vehicle, without both blue lights and siren, will become involved in pursuits.[111]

According to Kenney and Alpert in their article "A National Survey of Pursuits and the Use of Police Force: Data from Law Enforcement Agencies," municipal agencies are more likely to restrict pursuits to marked units than county agencies "(64 percent vs. 53 percent)."[112] Again this is a determination each agency should make based upon the unique variables of their community.

D. Ending the Pursuit

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[111]LaGrange Police Department Vehicle Operations at 12.11 (rev'd 2-28-05) (copy attached at Appendix F).

[112]Kenney and Alpert at 320.

When developing the pursuit policy, the policymaker should determine the circumstances when discontinuing or terminating the pursuit is appropriate. During a pursuit, the need to apprehend the suspect should always outweigh the level of danger created by the pursuit. When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated.

1. Discontinuing the Pursuit

It is very important for the policy to address when the pursuit will be discontinued. As defined *supra*, discontinuing a pursuit occurs when the law enforcement officer ends his involvement in the pursuit by slowing down to the posted speed limit and turning off the emergency lights and siren. In the absence of any viable and timely method of terminating the pursuit, discontinuing a pursuit should occur when the danger to the public is greater from the pursuit than the danger to the public should the suspect escape.

In addition to this paramount consideration, pursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public. Finally, a pursuit should be discontinued when the violator's vehicle location is no longer known.

2. Terminating the Pursuit

As defined *supra*, terminating a pursuit occurs when the officer uses intervention methods, such as tire deflation devices (stop sticks), roadblocks, ramming, or the PIT maneuver, to stop the continued movement of the suspect vehicle. The pursuit policy should address only those

methods that the officer has been trained to use. Additionally, the pursuit policy should address when these intervention methods may be used. For example, the Georgia State Patrol policy regarding stationary roadblocks states:

> Stationary roadblocks will be used only in extraordinary circumstances and only with the permission of an NCO or commissioned officer. No stationary roadblock shall be set up on a hillcrest or in a curve. The roadblock must be visible from a sufficient distance to allow the suspect the opportunity to safely stop.

With regard to these methods, the policy may want to require officers to consider various intervention methods prior to utilizing others. For example, the Georgia State Patrol policy states that the PIT maneuver "should not be used until other methods for stopping a fleeing vehicle (e.g. tire deflation devices and roadblocks) have been considered and determined not to be feasible." As discussed in the legal section of this paper, the use of these intervention methods will be considered a Fourth Amendment seizure by the courts and must be objectively reasonable.

a. Tire Deflation Devices

There are some specific considerations which should be addressed regarding tire deflation devices, such as stop sticks or spike strips. Specifically, the policy should address the circumstances that warrant the use of the device, and whether a supervisor needs to approve the use. The policy should incorporate or reference the manufacturer's recommendations as to speed for deployment and any limitations on use. For example, some stop sticks may only be used at speeds greater than 25 mph and may not be used

on motorcycles. Additionally, all enforcement personnel involved in the pursuit should be notified of the location where the devices have been deployed.

b. Roadblocks

If feasible and personnel are available to create it, a roadblock may be used when the suspect is creating a danger to the public. The use of the roadblock will be a Fourth Amendment seizure and must be objectively reasonable. Policy considerations include the following:

1. Requiring the approval of the roadblock by the supervisor;
2. Utilizing marked patrol vehicles with the emergency lights and headlights activated, but not intentionally directed to blind the driver of the pursued vehicle;
3. Ensuring that officers are not inside any vehicles used in the roadblock;
4. Requiring that the roadblock be clearly visible and there is an adequate warning to allow vehicles to come to a safe stop;
5. Taking into account road and weather conditions when considering stopping distance and visibility;
6. Setting up the roadblock to prevent civilian vehicles traveling into the area of the roadblock;
7. Communicating to all law enforcement personnel, including other participating agencies, involved in the pursuit of the decision to deploy a roadblock and its location; and
8. Addressing the use of civilian vehicles when constructing the roadblock.

With regard to the visibility of the roadblock, recall the case of *Brower v. County of Inyo*, where the roadblock was set up on a curve and a spotlight was directed so as to blind the driver as he rounded the curve. *Brower* teaches law enforcement that the roadblock must be visible and there must be enough distance for the driver to stop his vehicle safely. For these reasons, some policies mention a specific number of feet (500 or 1000 feet), while others state only that the roadblock must be visible from a sufficient distance to allow the suspect the opportunity to stop safely. Setting a specific distance may not be wise because it is unlikely that there will be time to measure the distance and also 500 feet may not be enough distance to stop if the roads are wet, speeds are high (over 100 mph) and the suspect's perception and reaction time is slow. If, however, the policy does not set a distance, training should address the variables that are factored into stopping distances.

If the agency uses and trains regarding mobile or rolling roadblocks, the policy should also address at what speeds and under what circumstances that the rolling roadblock should be utilized.

c. PIT Maneuver

As with the roadblock, the use of the PIT maneuver is a seizure and must comport with the reasonableness requirements of the Fourth Amendment. Accordingly, the policy should describe the circumstances that warrant the use of the PIT. For example, the Georgia State Patrol pursuit policy permits the use of the PIT maneuver when the "trooper or troopers in the pursuit determine that the fleeing vehicle must be stopped immediately to safeguard life and

preserve public safety."[113] The policy also carefully delineates the factors to consider before utilizing the PIT maneuver.

> Georgia Department of Public Safety Policy No. 1702 Pursuits
>
> 4. PIT Maneuver
>
> a. If the trooper or troopers in the pursuit determine that the fleeing vehicle must be stopped immediately to safeguard life and preserve public safety, the PIT maneuver may be used.
>
> b. The PIT maneuver shall only be used by troopers in accordance with Department training received on the PIT maneuver.
>
> c. The PIT maneuver should not be used until other methods for stopping a fleeing vehicle (e.g. tire deflation devices and roadblocks) have been considered and determined to be not feasible.
>
> d. The PIT maneuver should be used only when the danger from the continued pursuit is greater than the danger associated with using the maneuver to end the pursuit. Before

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[113]Georgia Department of Public Safety Policy 17.02 Pursuits at 5 (8/25/2005).

the PIT maneuver is used, factors that affect the safety of using the technique should be considered. These factors include:

1) Condition of the road:
   a) Wet or dry
   b) Width
   c) Divider or other obstruction
   d) Roadside obstructions (trees, ditches, buildings, etc.)

2) Visibility:
   a) Distance ahead
   b) Darkness

3) Traffic volume:
   a) Anticipated volume due to time of day (school hours, commuter traffic)
   b) Actual volume based upon observation

4) Pedestrian traffic:
   a) Anticipated volume due to location (school or college nearby, industrial area)
   b) Actual volume based upon observation

5) Type of fleeing vehicle:
   a) Pickup truck (high

center of gravity, narrow wheel base)
b) Small car (narrow wheel base, small tires)
c) Van (high center of gravity, narrow wheel base)

6) Occupants:
a) Number of people in the vehicle
b) Whether children are visible in the vehicle
c) Whether the occupants are wearing seatbelts
d) Whether the windows are down

7) Reasonable speed as determined by the following factors:
a) Whether the violator is showing total disregard for public safety
b) Whether the violator is slowing but not stopping for stop signs or other traffic control devices
c) Whether the violator is darting at other vehicles
d) Whether the violator is driving on the wrong

side of the road
e) Whether the violator is running other motorists off the road

e. The PIT maneuver is considered a use of force and the trooper's individual actions must be objectively reasonable. The trooper will consider all the factors listed above, including his experience, his abilities, and the danger of continuing the pursuit. The PIT maneuver will only be executed when the need to stop the pursuit is immediate. The trooper must be able to articulate the reason for his actions.

f. The PIT maneuver shall not be used to stop a pursuit with a motorcycle or ATV.

Another consideration, which will be discussed in detail infra, in the utilization of the PIT maneuver, is that it may be more hazardous when used on vehicles with a high center of gravity such as vans and Sports Utility Vehicles (SUV). Consequently, the policy may want to direct the officer to consider the speed of the vehicle when deciding to use the PIT maneuver on certain vehicles.

d. Deadly Force

There are two other methods of terminating a pursuit – ramming and the use of a firearm, and both are considered deadly force by the courts. When the suspect is creating an imminent threat of serious bodily harm or loss of life, the use of deadly force will be reasonable. The pursuit policy, however, should specifically address this.

Discharging a firearm at a moving vehicle should be addressed in the pursuit policy. For example, the Valdosta Police Department Vehicle Pursuit policy states:

> Firing from or at a moving vehicle or its occupants will only be deemed acceptable when the officer involved can demonstrate an articulable exigent circumstance which makes this action necessary for the protection of human life from an imminent threat of serious bodily harm or loss of life. Discharging a firearm from a moving vehicle is discouraged in any event.[114]

When using a firearm, however, the officer should be intending to disable the driver, not merely to stop the vehicle. The Atlanta Police Department Pursuit Policy states:

> Police officers will not discharge their firearm in an effort to stop a fleeing vehicle. (This does not prohibit a police officer from using his or her firearm as a lethal force option when it is reasonable and necessary.)

Another way to handle the issue of firing at a vehicle is to reference the agency's use of force policy. For example, the Georgia Bureau of Investigation Directive 4-3 Vehicle Stop, Pursuit and Emergency Vehicle Operations policy states: "Firearms shall not be discharged at any moving vehicle unless the use of deadly force is justified in accordance with the provisions of Investigative Division Directive 10-2."

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[114]Valdosta Police Department General Order 200-41 Vehicle Pursuit at 5 (01-01-06).

With regard to ramming which is also considered deadly force, the pursuit policy should also state when this is permissible or conversely, when it is not. The Valdosta Police Department has chosen to forbid the use of the police vehicle to stop a suspect vehicle. Specifically, the General Order directs that: "Officers may not attempt to stop a suspect vehicle in a pursuit by striking the suspect's vehicle with a police vehicle." The LaGrange Police Department's Vehicle Operations policy generally prohibits "forcible stops" except for stationary roadblocks as "a last resort" and with approval of the supervisor.

The Gainesville Police Department allows ramming only as a last resort, but provides very specific guidance. It states:

Ramming – Deliberate ramming or intentional physical contact between vehicles by an officer is considered a use of deadly force and should be only considered as a *last resort.* This action must be approved by the highest-ranking supervisor prior to its utilization.[115]

In sum, it is essential that the pursuit policy address discharging a firearm or ramming as such actions will be considered the use of deadly force and subject to the Fourth Amendment's reasonableness requirement.

E. Review of Pursuits

When developing the pursuit policy, the agency should consider a review process after each pursuit and on an annual basis. The purpose of the review is threefold: (1) to determine whether the pursuit complied with agency policy;

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[115]Gainesville Police Department Vehicular Pursuits No. 558 at 8 (10-07-04).

(2) to identify training needs; and (3) to observe any patterns of performance which have surfaced as a result.

In order to permit meaningful review of pursuits by the agency, the officer who acted as the primary unit and/or the supervisor should prepare a pursuit report. As part of this review, the officer and the supervisor should review any videos of the pursuit. The pursuit report should be reviewed through the officer's chain of command, to include the agency training section, policy development unit, and the agency internal affairs or Office of Professional Standards Unit.

In addition to annual reviews of pursuits, the agency may want to consider a review over a fiveyear period or more to see additional trends. For example in 2005, the LaGrange Police Department Office of Professional Standards conducted a review of all pursuits by the department since 1997.[116] The review determined that there were 164 pursuits in that time period, approximately 21 per year. It then addressed the reasons for the pursuits – 106 traffic violations, 16 felony violations, and 59 other misdemeanors. As a result of that review, it was recommended that the department modify the vehicle pursuit policy and "eliminate vehicle pursuits that do not relate directly to felony offenses or which put the general public in danger unless apprehended." In response to that review, the LaGrange Police Department changed its pursuit policy.

The benefits of such a review are many. First, the review was not precipitated by a serious injury or death of a suspect, citizen or police officer. Yet, the Office of Professional

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[116]January 5, 2005 Memorandum from Lt. J. Hall to Chief Louis M. Dekmar.

Standards recognized that serious injuries or death can occur in any pursuit and deemed the issue important enough to justify a review. Additionally, the policy change was recommended by the staff and consequently may be more likely to be accepted by the officers than something coming directly from the Chief. Lastly, if an injury or death does occur during an authorized pursuit, the policy change is excellent evidence regarding the care with which the department makes its policy decisions.

F. Training

In order to ensure that officers comply with the pursuit policy, the agency should provide training for officers on the pursuit policy. It is recommended that all newly appointed sworn personnel should not be assigned to enforcement duties until receiving training on the agency's pursuit policy. In addition, all sworn personnel should receive annual training on the pursuit policy. This is a requirement for agencies certified by the Georgia Police Accreditation Coalition[117] and is suggested by the Commission on Accreditation in Law Enforcement (CALEA) for CALEA accredited agencies. As pursuits are a high liability area, annual training makes sense.

For those agencies that utilize the PIT maneuver, roadblocks, or tire deflation devices, the annual training should refresh the officers regarding these techniques. The PIT maneuver should only be performed by those officers who have received training from a certified PIT Instructor or academy

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[117]State of Georgia Law Enforcement Certification Program Third Edition Standards at 1.11 located at http://www.gpacinc.com/resources.htm ("The agency has a written directive that requires each sworn officer receive annual training on . . . vehicle pursuits").

certified to teach the maneuver. Reviewing the use of these intervention techniques on an annual basis in training will remind officers of the proper use of the techniques.

Additionally as discussed, the review of the pursuit reports by the training section and the internal affairs unit may identify officers who need additional training either because the initiation of the pursuit did not comply with agency policy or because proper procedures were not followed during the pursuit. The additional training may include video footage of pursuits and a debriefing or analysis of the officer's actions in those pursuits. Such additional training will provide evidence that the agency enforces its policy and does not merely pay lip service to it.

Lastly, the agency command staff should foster an agency culture that positively recognizes those officers who discontinue pursuits that are creating a danger to the public when terminating the pursuit is not a viable option. It will always be hard for an officer to discontinue a pursuit and let the suspect go. The agency can recognize this good judgment on the part of an officer by noting it in the officer's evaluations and also in the pursuit files. The fact that an officer chose to discontinue a pursuit on one occasion will be excellent evidence that he clearly understands the need to balance the safety of the public with the need to apprehend in the event that another pursuit ends tragically. Additionally it provides strong evidence that the agency pursuit policy is being followed.

V. An Engineering Analysis of the PIT Maneuver

Throughout this paper, the Committee has recognized the dilemma posed by pursuits. The fleeing suspect creates a danger to the public – either due to his driving or past conduct, and often that danger was created prior to the

initiation of the pursuit. Guided by agency policy, the officer must choose whether to initiate a pursuit or not. In cases where the pursuit is initiated, every effort should be made to terminate the pursuit as quickly as possible.

The Committee decided to focus additional study on the PIT maneuver because, when properly utilized, it is a means to terminate pursuits safely. To this end, the Committee requested assistance from the George W. Woodruff School of Mechanical Engineering at the Georgia Institute of Technology ("Georgia Tech") to study the engineering and physics of the PIT maneuver. Before discussing this research, the Committee will briefly review the history of the PIT.

a. History of the PIT Maneuver

The Georgia State Patrol has been utilizing the PIT maneuver since 1997.[118] The decision to utilize the PIT maneuver was made to provide a means to "end a pursuit quickly and safely."[119] Developed more than two decades ago, the PIT maneuver was described by the National Institute of Justice in 1996 as a "potential alternative" to high-speed pursuits. Specifically, the article described the PIT as follows:

> Precision Immobilization Technique
>
> Known initially as "tactical ramming" or

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[118]Georgia Department of Public Safety, *Pursuits and the PIT Maneuver*, Prepared for the Georgia Board of Public Safety 1 (Dec. 7, 2005) (hereinafter "*Pursuits and the PIT Maneuver*").

[119]*Pursuits and the PIT Maneuver* at 1.

> "legal intervention," this maneuver was more fully developed and popularized more than a decade ago by BSR Inc., the Summit Point, West Virginia, advanced driver training center, as tactical vehicle interception (TVI), a formal training technique for law enforcement. The first large law enforcement agency to teach TVI as a technique to halt fleeing vehicles was the Fairfax County (Virginia) Police Department, which modified the program for police use and named it "precision immobilization technique" or PIT. The technique involves easing up to and making contact with a fleeing suspect's car in such a way as to cause the target car to snap sideways and come to a halt. While this technique is not applicable in every situation, the key to its effective use is to carefully choose a favorable spot before attempting PIT and to first consider the possible effects on other traffic and pedestrians."[120]

The California Highway Patrol has been utilizing the PIT since 1986.[121] Minnesota Highway Patrol and Fairfax County Police Department have been using it since 1988.[122]

Georgia State Patrol is the largest police agency in Georgia

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[120]National Institute of Justice, *High-Speed Pursuit: New Technologies Around the Corner*, U.S. Dept. of Justice (Oct. 1996) at 4-5.

[121]*Pursuits and the PIT Maneuver* at Att. 4 PIT Maneuver Training Syllabus at 4.

[122]*Id.*

that currently utilizes the PIT. As addressed earlier, the Georgia State Patrol's Pursuit Policy explains the factors that should be considered before using the PIT maneuver. The policy defines PIT as follows:

> Precision Immobilization Technique (PIT) - The intentional act of using a trooper's vehicle to physically force a fleeing vehicle from a course of travel in order to stop it. The PIT maneuver is a specific, technical maneuver which requires advanced practical training prior to use. When executed by properly trained members under reasonable and prudent circumstances, the PIT maneuver does not constitute deadly force. In other circumstances, the PIT maneuver may constitute deadly force and may only be used when authorized by law.[123]

In view of the Georgia State Patrol's extensive experience in training and using the PIT, the Committee asked its training staff to assist the Georgia Tech researchers.

b. Georgia Institute of Technology Research Project

In an effort to provide more guidance to policymakers, the Committee asked the faculty at Georgia Tech to research the safety of the PIT maneuver. Although the PIT has been used by law enforcement as an effective technique to terminate pursuits, it has never been studied by engineers. Dr. David M. Sanborn, Associate Chair for Undergraduate Studies of the George W. Woodruff School of Mechanical Engineering

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[123]Georgia State Patrol Policy No. 17.07 Pursuits at 2-3 (rev'd Aug. 24, 2005).

supervised a design project planned and executed by four seniors[124] as a research project in a mechanical engineering design class. The goal of the project was "to study the maneuver by using physical experimentation and computer simulations."[125] The study hypothesized that the PIT is a "controlled and predictable maneuver"[126] that does not cause the vehicle to rollover when performed properly.[127] This hypothesis tracks the experience of the Georgia State Patrol, which teaches its troopers that "after contact, a vehicle always travels in a direction that was reasonably predictable for use on the public highway."[128] Avoiding rollover is the key consideration because if there is no rollover, assuming the driver is wearing his seatbelt as required by law, then it is unlikely that there will be any serious injury or death as a result of the PIT maneuver. The study did not take into account "a crash that results from the vehicle skidding into another vehicle, person or object."[129]

The research project had two parts: (1) to measure the force applied from the police car to the target car during an actual

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[124]Three of the seniors, Zachary Barbre, William Hagler and Kirsten Lundstrom, graduated in May of 2006. The other, Navneet Chhabra, will graduate at the end of the summer semester in 2006.

[125]Sanborn, David M., PIT: Precision Immobilization Technique ME 4182 Section D, George W. Woodruff School of Mechanical Engineering, Georgia Institute of Technology at 1(April 28, 2006) (on file with the Georgia Association of Chiefs of Police).

[126]Sanborn at 1.

[127]Sanborn at 3.

[128]*Pursuits and the PIT Maneuver* at Att. 4 PIT Maneuver Training Syllabus at 4.

[129]Sanborn at 3.

PIT maneuver; and (2) to model the PIT maneuver in a simulation program called MSC ADAMS/Car.[130] After designing and building a load measuring device, the researchers went to the driving track at the Georgia Public Safety Training Center to implement the first part of the research project.[131]

The Georgia State Patrol Training staff assisted the researchers by first defining and explaining the PIT maneuver. In a nutshell, the PIT maneuver follows four steps: match, touch, turn and follow through.[132] In executing the PIT, the police car first matches the speed of the suspect car. Next, the police car touches the rear end of the suspect car. After the police car makes contact, the officer turns the steering wheel a quarter turn to apply force. After application of the force, the suspect car will pivot around the police car, continue to spin and come to a stop.[133]

In order to determine the force used during the PIT, the training staff conducted the PIT maneuver at various speeds. During these demonstrations, the researchers were able to measure the force applied during the PIT maneuver and also, through the use of a camera mounted on the bumper, obtain actual video footage of a PIT maneuver.[134] There were eight PIT maneuvers executed at speeds of 40, 35, 35, 45, 45, 50, 55 and 60 mph. Of these eight runs, three runs produced

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[130]Sanborn at 1.

[131]Sanborn at 11.

[132]Sanborn at 3.

[133]Sanborn at 3.

[134]Sanborn at 11-12.

measurable data regarding the amount of force utilized by the police car.[135] Additionally, no run resulted in any vehicle rolling over and no injuries were sustained by any drivers or passengers in the vehicles during the runs.

The data regarding the force used is summarized in the table below:[136]

Experimental PIT Force

Speed (mph)	Force (lbf)
45	800
55	600
60	620

As is evident, the "experiment confirmed that as the speed increases, the maximum force needed to immobilize the target car decreases."[137] In other words, the amount of force necessary to effectuate the PIT maneuver decreases with the increased speed.

The Committee also requested that the researchers consider whether a ramming technique is effective in displacing the suspect vehicle. As requested, the researchers also experimented with "ramming" the suspect car as opposed to "touching" the suspect car using the PIT maneuver. It was determined that a ram was not effective in displacing the car

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[135]For these three runs, the police car made continuous contact with the measuring device during the entire maneuver enabling the force to be measured. In the other runs, the police car did not make continuous contact with the measuring device.

[136]Barbre, *Z. et al,* PowerPoint presentation, "*PIT Testing and Simulation*" Slide 17 (May 2006) (on file with the Georgia Association of Chiefs of Police).

[137]Sanborn at 13.

from the roadway.[138] Additionally, the ramming required more force than the force used in the PIT maneuver.

After conducting the application of force research at the Georgia Public Safety Training Center, the researchers concluded the following regarding the PIT Maneuver and ramming:

> If the PIT maneuver is performed under the correct conditions and with the proper procedure, the results of this maneuver are very consistent and predictable. This was observed at the Georgia Public Safety Training Center where the PIT maneuver was performed at [speeds from 35 to 60[139]] mph with dry road conditions. Additionally, it was observed that if the officer car did not "touch" the target car, but instead "rammed" into the target car, the maneuver was completely ineffective. This ineffectiveness vividly illustrates the difference between the controlled PIT and an uncontrolled collision. A properly executed PIT requires a steady force applied over a second or two, not a sharp impact.[140]

The next step of the research project was to utilize a computer simulation of the PIT maneuver to determine how the car would perform at higher speeds. The computer simulation was done in the MSC Adams/Car computer

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[138]Sanborn at 3.

[139]June 5, 2006 Telephone conversation with Dr. Sanborn.

[140]Sanborn at 3.

program.[141] The Adams/Car is similar to a Ferrari, a low center of gravity sports car with wide tires. The topography of the road used in the simulation was a smooth, flat road and the simulation was performed with both dry and wet road conditions.[142]

The simulation results matched those of the experiments at the Georgia Public Safety Training Center.[143] The amount of force decreased as the speed increased.[144] The chart below shows the speed and force for the computer simulation.[145]

Simulated PIT Force

Speed (mph)	Force (lbf)
45	875
55	810
60	780

As is evident from the chart, the model car required the application of greater force to force it into the PIT maneuver.[146] The researchers concluded that this was due to the wider tires on the model car.[147] The model car also never

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[141]Sanborn at 6.

[142]Sanborn at 20.

[143]Sanborn at 24.

[144]Sanborn at 24.

[145]Barbre at Slide 22.

[146]Sanborn at 24.

[147]Sanborn at 24.

rolled over, even at speeds up to 120 mph.[148]

The simulation verified the experimental conditions observed at the Georgia Public Safety Training Center.[149] The PIT maneuver appears to be predictable and controllable under the conditions simulated (a smooth, flat road under both wet and dry conditions) and at speeds up to 120 mph with a low center-of-gravity vehicle such as the Adams/Car.

The researchers also attempted to model a high center-of-gravity vehicle, such as a sports utility vehicle in the Adams/Car software.[150] Due to the limitations of the software program, this was not successful.[151] The researchers, however, were able to perform rollover calculations using basic laws of dynamics in Microsoft Excel on other vehicles.[152] These calculations demonstrated that higher center of gravity vehicles, such as a Ford Explorer or an Isuzu Trooper, were more likely to roll over.[153] The analysis showed that the likelihood of a rollover for a given vehicle is inversely proportional to the coefficient of friction between the tires and the road, shoulder or other surface.[154]

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[148]Sanborn at 25.

[149]Sanborn at 2.

[150]Sanborn at 24.

[151]Sanborn at 24.

[152]Sanborn at 24.

[153]Sanborn at 25.

[154]Sanborn, E-mail message to Chief Dekmar (August 2, 2006) (copy on file with the Georgia Association of Chiefs of Police). Professor Sanborn requested the addition of these three sentences as a clarification to the original paragraph contained in the July 22, 2006 version of this

However, for a given coefficient, rollover likelihood is directly proportional to the ratio of the height of the center of mass to the wheel track width. Therefore, on a given road surface, the vehicles with high values of this ratio are the ones most likely to rollover. Due to its wide track width and low center of gravity, the Adams/Car was impossible to roll over during the simulation.[155]

This research supports the policy and training of the Georgia State Patrol. Based upon their nine years of performing the PIT maneuver, Georgia State Patrol policy lists the type of vehicle as one of the factors that should be considered when deciding to use the PIT maneuver. Specifically, the pursuit policy states:

> d. The PIT maneuver should be used only when the danger from the continued pursuit is greater than the danger associated with the using the maneuver to end the pursuit. Before the PIT maneuver is used, factors that affect the safety of using the technique should be considered. These factors include:
>
> . . .
>
> 5) Type of fleeing vehicle:
>
> a) Pickup truck (high center of gravity, narrow wheel base)
>
> b) Small car (narrow wheel base, small tires)
>
> c) Van (high center of gravity, narrow wheel base)

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paper.

[155]Sanborn at 25.

In addressing this policy provision during training, the training staff explains that using the PIT maneuver at higher speeds on vehicles such as vans and pickup trucks, which have a high center of gravity, may be more likely to result in a rollover.[156]

In summary, the Georgia Tech research confirms law enforcement's experience with the PIT maneuver. Properly performed by a trained driver under certain conditions, it is a controlled, predictable method to stop a pursuit. The PIT maneuver can be simulated utilizing a computer model. The computer simulation results as to the force needed to perform the maneuver displayed the same linear, predictable trend as did the experiments with actual vehicles.

Additionally, the research demonstrates that the PIT maneuver is not the same as ramming. It uses far less force than a ram.[157] Moreover, the ramming of a suspect vehicle is not controlled and hence, not predictable.

c. Legal and Policy Considerations in Utilizing the PIT Maneuver

As has been discussed in detail supra in the section regarding Fourth Amendment claims, the courts will consider the PIT maneuver as a seizure within the meaning of the Fourth Amendment.[158] As a seizure, it must comply with the Fourth

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[156]Pursuits and the PIT Maneuver at Att. 4 at 7.

[157]The ram used 2000 lbf in 1/10 of a second.

[158]*Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (holding that Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied").

Amendment's requirement that the seizure be objectively reasonable. In *Graham v. Connor*, the United States Supreme Court has described an "objectively reasonable" use of force:

> Today we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force—deadly or not— in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard . . . .
>
> Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.[159]

As previously discussed, *Harris v. Coweta County*[160] is a recent case decided by the Eleventh Circuit Court of Appeals that addresses the use of an automobile as a use of force. In *Harris*, the Eleventh Circuit explained:

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[159]*Graham v. Connor*, 490 U.S. 386, 395-96 (1989) (internal citations omitted).

[160]433 F.3d 807 (11th Cir. 2005).

> To establish an excessive force claim, Harris must show first that he was subjected to a "seizure" within the meaning of the Fourth Amendment. . . .
>
> The district court concluded, and Scott does not contest, that Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash.
>
> . . .
>
> Having determined that Harris was seized, we turn to the question of whether the force used by Scott to effectuate the seizure was reasonable, in light of the facts according to Harris. . . .
>
> Like other instrumentalities, the use of an automobile cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately to cause death or serious bodily injury.[161]

As *Harris* holds, the use of an automobile as a seizure may be considered deadly force.

Hence, the key question concerning the use of the PIT maneuver by the officer centers on whether it would be considered "deadly force." In 1985, the United States Supreme Court held that law enforcement officers may use

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[161] *Harris*, 433 F.3d at 812-14 (emphasis added, internal citations omitted).

deadly force to protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm; and/or to prevent the escape of a fleeing violent felon who the officer has probable cause to believe will pose a significant threat of death or serious physical injury to the officer or others.[162]

In order to answer whether the PIT maneuver would be considered deadly force, it is first necessary to define deadly force. The courts, including the Eleventh Circuit, have adopted the Model Penal Code definition of deadly force. The Model Penal Code defines "deadly force" as follows:

> Force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.[163]

In a later case involving a person who died after being fettered, the Eleventh Circuit concluded that fettering or hog-tying was not deadly force because the evidence did not show that "death or serious injury [was] a likely consequence of fettering a person."[164]

The courts have not yet explicitly ruled on whether the PIT

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[162]*Tennessee v. Garner*, 417 U.S. 1, 11 (1985).

[163]*Pruitt v. City of Montgomery, Ala.*, 771 F.2d 1475, 1479 (11th Cir. 1985).

[164]*Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004).

maneuver is deadly force.[165]

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[165]Research located two other cases regarding the PIT Maneuver. In one, *Abney v. Coe*, the PIT Maneuver was defined as "bumping, ramming or sideswiping a vehicle in order to end a chase." 2006 U.S.Dist. LEXIS 29547 *10 (M.D.N.C. April 25, 2006). In that case, a deputy was pursuing a motorcycle and "bumped" the motorcycle to get it stopped, the motorcycle continued, but was wobbling, and was ultimately struck by the deputy's car. *Abney* at *6-8. The court concluded that if the deputy intentionally struck the motorcycle, this would constitute deadly force. *Abney* at *16. Accordingly, the court denied summary judgment and left it for a jury to decide whether the driving created a substantial threat to the officers and others. *Abney* at *20-21. In *Abney*, however, the definition that the court accepted of the PIT Maneuver is not the definition used by the Georgia State Patrol and studied by the Georgia Tech researchers. Additionally, Georgia State Patrol policy does not permit utilizing a PIT Maneuver on a motorcycle. Georgia State Pursuit Policy No. 17.02 Pursuits at 6.

In the other case involving a PIT Maneuver, the use of the PIT Maneuver did not stop the driver as he was able to regain control of his vehicle after being pitted three times. The court did state that the use of the PIT was "in an attempt to stop the fleeing Cotois vehicle and apprehend its driver. The only harm intended by this conduct was incidental to [the officer's] legitimate objective of arresting Contois." *Helseth v. Burch*, 258 F.3d 867, 872 (8th Cir. 2001). The court further stated that had the officer succeeded in stopping Contois using the PIT, those actions would have been "subject to a reasonableness challenge under the Fourth Amendment." *Helseth*, 258 F.3d at 872. Significantly, however, it made no finding that the use of the PIT Maneuver was deadly force. The court further pointed out that "Contois was a fleeing criminal, whose irresponsible high-speed driving endangered countless citizens and ultimately killed one innocent bystander and maimed another. Burch and the other police officers who risked their lives to remove this menace from the public highways were not guilty of a conscience-shocking intent to harm." *Id.* at 872. In the dissenting opinion, one judge did conclude that the use of the PIT Maneuver was "deadly force when used on a vehicle moving at high speeds" because "intentional ramming causes the high probability of serious injury or death." *Id.* at 877. The dissent did not have the benefit of the Georgia Tech research and the experience of the Georgia State Patrol when it made this statement. As discussed, the PIT maneuver is very different than a ram.

Using the Model Penal Code definition of deadly force, it is the Committee's opinion that the PIT maneuver is not deadly force because death or serious injury is *not* a likely consequence of using the PIT maneuver in accordance with proper training and policy. The Committee's opinion is based upon the current law, the Georgia Tech research project and the Georgia State Patrol's statistics and experience.

With regard to the law, the Eleventh Circuit has spoken about the PIT maneuver in *dicta*[166] in the *Harris* case. In *Harris*, the officer had not been trained to execute a PIT maneuver, never attempted to use the PIT to stop the suspect vehicle, and instead chose to ram the vehicle to cause it to leave the roadway. In determining that the supervisor was not liable, the Eleventh Circuit made a clear distinction between a PIT and a ram. The court said very specifically:

> Scott, however, chose not to execute a PIT at all, but rather to ram the car at a very high speed from behind. Because this ramming was not authorized by [the supervisor], we cannot say that [the supervisor's] conduct-authorization of a *safe PIT* that was not executed-violated Harris' constitutional rights.[167]

As mentioned, this description is *dicta* as the PIT maneuver was not executed in Harris; however the description of the

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[166]Dicta is the plural term for "dictum." Dictum is defined as "a judge's statement of opinion on some legal point not essential to and other than the principal issue of the case." WEBSTER'S NEW WORLD DICTIONARY 392 (2nd College Ed. 1972).

[167]Harris, 433 F.3d at 817 (emphasis added).

PIT as "safe" provides support for the conclusion that a court would find that it is not deadly force.

Even more importantly, the data collected by the Georgia State Patrol shows that the use of the PIT maneuver is not likely to cause death or serious injury. According to the 2001-2004 Pursuit Summary Report, troopers engaged in 971 pursuits during this time period.[168] In 195 cases, the PIT maneuver was utilized to stop the vehicle.[169] In three of the 195 cases, there was a fatality crash associated with the use of the PIT maneuver.[170] In two of those fatality crashes, the suspect was not wearing his seatbelt. In two of the fatality crashes, the vehicle left the roadway and struck a tree. In one of the fatality crashes, the vehicle left the roadway and rolled over, which ejected the driver who was not wearing his seatbelt.

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[168]Pursuits and the PIT Maneuver at Att. 3 Pursuit Summary Report 2001-2004 at 1.

[169]*Id.* at 4.

[170]*Pursuits and the PIT Maneuver* at 5-8. The crashes occurred on February 7, 2001, March 26, 2004 and August 17, 2004. In one case during this period, a trooper was killed during a pursuit on December 1, 2003. He attempted to use the PIT maneuver; however, the suspect struck the trooper's car with his truck, causing the trooper to lose control of his vehicle. The investigation performed by the Special Crash Reconstruction Team (SCRT) determined that the "cause of death associated with this collision [was] not related to the PIT maneuver, but linked directly to the actions of the fleeing driver." *Pursuits and the PIT Maneuver*, at 7. In addition to this case, there have been three fatalities involving the PIT Maneuver outside of the 2001-2004 time period: January 11, 1999; January 27, 2005; and March 19, 2006. There is no data as to the number of PIT maneuvers performed in the years 1999 and 2000. As of the submission of this report, the Georgia State Patrol statistics for 2005 were not available.

As is evident from these numbers, the PIT maneuver caused death in only 1.5% of the cases in which it was used. Such a small percentage cannot be said to create a "substantial risk of causing death or serious injury." Significantly, two of the three fatalities involved suspects who were not wearing their seatbelts.[171] Hence the failure to wear a seatbelt also played a part in these fatalities and the drivers may have survived had they been wearing their seatbelts.[172]

In addition to the data from the use of the PIT maneuver on suspects, Georgia State Patrol has data regarding training. According to the Driver Training Coordinator:

> Since the Georgia State Patrol began training in the PIT maneuver in 1998, there have been approximately 1,485 law enforcement officers trained. During this training there have been approximately 61,800 PIT maneuvers performed with no injuries. Most PIT maneuvers were performed at 35 – 50 mph. There have been at least 40 high speed PIT demos at speeds in excess of 70 mph. All of these PIT maneuvers are included in the

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[171]In Georgia, seatbelt use is inadmissible in civil cases as evidence of "negligence or causation." O.C.G.A. §40-8-76.1(d). In determining whether the use of the PIT Maneuver is the use of the PIT maneuver is deadly force, however, the lack of a seatbelt should be considered. A suspect who uses his seatbelt is far less likely to sustain serious injury or die during the execution of the PIT maneuver.

[172]According to the National Highway Traffic Safety Administration, "In 2004, the majority (55%) of the occupants of passenger vehicles . . . killed in motor vehicle crashes were unrestrained." Traffic Safety Facts Research Note, "Restraint Use Patterns Among Fatally Injured Passenger Vehicle Occupants" (May 2006), retrieved from http://www-nrd.nhtsa.dot.gov on June 7, 2006.

above numbers.

> The number above does not reflect any PIT maneuvers that were performed as demos for [the] news media, dignitaries (board members, politicians, government officials etc.) or outside of a scheduled training session. An estimated number of these types of PIT maneuvers would bring the total very close to 62,000 performed during training with no injuries or fatalities.[173]

Additionally during PIT maneuver training, there have been two instances where the vehicle rolled over.[174] Both rollovers occurred when instructors were driving the vehicles. "The primary cause of these two rollovers was the surface of the shoulder around the track. The sand piled up as the tires slid across the ground and eventually dug in enough to cause the rollover."[175] Of course the instructors were wearing their seatbelts and there were no injuries as a result of the rollovers.

After analyzing these numbers, the Committee concludes that the PIT maneuver when used properly by a trained officer is not deadly force within the meaning of the Model Penal Code definition.[176] The Georgia Tech research proves

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[173]June 9, 2006 Memorandum from Sgt. Ryan Newman to Captain Russell Powell (hereinafter "June 9, 2006 Memorandum") at 2.

[174]June 9, 2006 Memorandum at 1.

[175]June 9, 2006 Memorandum at 1.

[176]Deadly force may be authorized during pursuits if the suspect's driving was sufficiently reckless to pose "a substantial threat of imminent physical harm to motorists and pedestrians." *Harris*, 433 F.3d

that the PIT maneuver is controlled and predictable. It is very different than a ram. Additionally, the information collected by the Georgia State Patrol shows that the PIT maneuver is not likely to cause death or serious injury when used in accordance with Georgia State Patrol's policy.

Of course, the Committee also recognizes that the use of the PIT maneuver in certain circumstances could result in serious injury or death. For this reason, it is crucial that officers be properly trained in the use of the PIT maneuver and that policymakers provide clear guidance in agency policy for the use of the PIT maneuver.

VI. Technological Alternatives to Pursuits

This section will provide a general overview of the feasibility and availability of pursuit intervention tools. Technology has always proven to be a realm where devices render each other obsolete within short time spans. This is a phenomenon usually driven by new developments, research, improvements and cost reduction.

Pursuits pose a quagmire of challenges that predispose the technology sector to infinite dead ends and unique problem sets. This has resulted in a slow development process, often devoid of any novel approach that might realistically represent the new silver bullet to ending the police chase. Although ideas are many and some research is cited, publications specifically endorsing certain tools and techniques are few. The primary reason for this is the fact that, despite looking good on paper, many tools are not yet

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at 815. The courts have concluded that the suspect's driving created a substantial threat sufficient to authorize the use of deadly force, either in the form of a firearm or using the vehicle. *Harris*, 433 F.3d at 816 (citing cases).

viable.

In 1998, the National Institute of Justice[177] published a report examining the issue of police pursuits.[178] Regarding pursuit intervention technology, the report opined that:

> Police vehicle pursuits are dangerous, and officers have traditionally had few options in stopping a fleeing suspect. However, technological development may help to facilitate major changes in law enforcement services by the year 2000. Joint ventures now occurring between law enforcement and industry are indicative of future markets for advanced technology. The six prototype technologies described below offer seven potential alternatives to high-speed pursuits.[179]

The report then discussed the six prototype technologies: (1) retractable spiked barrier strip; (2) auto arrester systems; (3) Road Patriot™/Road Sentry™; (4) checkpoint barrier strip; (5) fleeing vehicle tagging system; and (6) precision immobilization technique. A prevalent theme to that report was that at the time, no acceptable technological means existed in terms of pursuit intervention, although

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[177]The National Institute of Justice is "the research, development, and evaluation agency of the U.S. Department of Justice and is dedicated to researching crime control and justice issues." Retrieved on June 8, 2006 at http://www.ojp.usdoj.gov/nij/about.htm.

[178]National Institute of Justice, "High-Speed Pursuit: New Technologies Around the Corner," (hereinafter "High-Speed Pursuit") U.S. Dept. of Justice (Oct. 1996).

[179]High-Speed Pursuit at 3.

electromechanical devices proved most promising. In terms of equipment available to the average police agency, not a lot has changed since then.

Also in 1998, the Pursuit Management Task Force (PMTF) was formed under the auspices of the National Institute of Justice's Office of Science and Technology.[180] It published a report regarding Police Pursuit Practices and the Role of Technology. After examining pursuit technologies, the report declared that:

> spike strips were found to be most frequently used, and currently, the most effective technology readily available. Most of the other reviewed technologies were in the conceptual or precommercial phases and require substantial testing and development. The PMTF identified a group of technologies that are of high priority for additional research, development and commercialization.[181]

Additionally, the report concluded that there was "currently no single technology on the horizon that affords a 'universal' solution to pursuits."[182] The PMTF also recommended technologies as "high priority" to move to prototype stages for evaluation. These high priority technologies were:

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[180]National Institute of Justice, Pursuit Management Task Force: Research Preview (hereinafter "Pursuit Management Task Force") 1 U.S. Dept. of Justice (Aug. 1998).

[181]Pursuit Management Task Force at 1.

[182]*Id.*

> retractable direct injection electrical systems; radiative electrical systems, including high-power microwave; cooperative systems with law enforcement activation; and auditory/visual sensory enhancements (improved warning devices).[183]

Some of these systems have now reached the testing stage and will be discussed in this paper.

In reviewing technology, there is one crucial consideration for the majority of agencies and that is cost. While the possibility of a police pursuit is present in every jurisdiction, not all jurisdictions have the financial resources to invest in some of the new technology. When many citizens think of a police department, they may think of large police agencies such as the Los Angeles Police Department or the City of Atlanta Police Department that employ more than a thousand officers. They may be surprised to learn that 90% of all law enforcement agencies in the United States employ less than 50 officers.[184] These smaller agencies, many of which are located in rural areas, only bring limited monetary resources to the table. Yet, these smaller agencies are just as likely to face a pursuit situation as the larger agencies. For this reason, this review will, whenever possible, address the anticipated cost of the new technologies.

Pursuit technology can be separated into several types: (1) mechanical; (2) tagging and tracking; (3) traffic preemption; and (4) cooperative systems. Some pursuit technologies,

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[183] *Id.* at 3.

[184] National Institute of Justice, *Law Enforcement Technology - Are Small and Rural Agencies Equipped and Trained?*, Dept. of Justice (June 2004) at 1.

particularly mechanical technologies such as spike strips, are already used by jurisdictions throughout the United States. Others are simply not feasible because of the expense. Still others just don't work very well.

A. Mechanical

Mechanical devices are those that disable the vehicle. Mechanical devices include (1) tire deflation devices such as stop-sticks or caltrops[185]; (2) barriers, fixed, movable, cable and inflatable; and (3) entanglers or nets. The Memphis Shelby Crime Commission conducted an excellent analysis of the strengths and limitations of each device and a chart summarizing this analysis is attached hereto as Appendix G.[186] As the analysis by the Memphis Shelby Crime Commission is so thorough, this section will only briefly review the stop-stick and a new product on the market.

The most widely used device is the stop-stick or tire deflation device. A stop-stick is a simple device that puts holes in the suspect vehicle's tires. The common operational principle to virtually all stop sticks is that they are designed to deflate the suspect tires slowly and safely. As a result, utilizing stop sticks seldom, if ever, results in crashes.

The real problem with stop-sticks is deployment. Prior to using them, officers must anticipate the most likely route of

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[185]Caltrops are "devices with four projecting strips that, when deployed, rest on three spikes with the fourth pointing upward." Memphis Shelby Crime Commission, The Role of Technology in Supporting Police Pursuit Policies (April 2001).

[186]"Analysis of Mechanical Systems" chart from Memphis Shelby Crime Commission, "The Role of Technology in Supporting Police Pursuit Policies" (April 2001).

the pursuit, outrun the fleeing suspect and get to a point where they can safely deploy stop-sticks in the roadway. Additionally, once the stopsticks are deployed, the officers must do their best to keep citizens out of the area of deployment. Hence, the utilization of stop-sticks requires a number of officers who are vigilant at key locations.

Attempts have been made to eliminate some of this process by the utilization of static placement of stop devices. One product allows officers to deploy a stop-stick type device from the back of the police car during the pursuit. One such device currently being advertised is designed to be dragged behind the front police vehicle at a distance of 16 feet.

One disadvantage to this device is the need to get in front of the fleeing vehicle to deploy the device. In a pursuit, the front vehicle has the disadvantage – and this is the reason that the PIT maneuver can be very successful in dislodging the front vehicle from the road. The officer places himself in jeopardy of being rammed by the suspect once he assumes the front position in the pursuit.

In addition to the danger to the officer deploying this device, the device currently sells for $1475.00 plus shipping. There is also a lease plan currently advertised at $500.00 down and $85.00 a month for one year. At this price, this device may be cost-prohibitive for smaller departments. To equip a small number of units, perhaps 10 patrol units, an administrator would have to budget $15,000.00 to purchase or $10,700.00 to lease for a year for something that may or may not effectively stop a pursuit – and may only be used in a small percentage of pursuits.

B. Tagging and Tracking

Suspect vehicle tagging and tracking involves a new method

of ending the physical engagement of the pursuit while allowing for the ongoing investigation.[187] One system being advertised allows the police to launch an adhesive Global Positioning System (GPS) tracking device onto a target vehicle, terminate the pursuit and apprehend the suspect at a later time. Using pre-existing technology, police can track the suspect vehicle anywhere.

This system is composed of commercial off-the-shelf technology. It is comprised of a tracking projectile that is a miniaturized GPS receiver, radio transmitter, power supply and a launcher which can be hand-held or mounted on a police car. Once the fleeing suspect's car has been tagged, its position is transmitted via wireless modem, allowing a centralized information facility (usually the agency dispatch center or 911 Center) to view the suspect vehicle's exact location. In many cases, this would allow a pursuit to be replaced with an interdiction strategy. A tagging system works best when there are helicopters available to assist in the tracking.

Ultimately, this device can be used eventually to identify and track the suspect vehicle. Of course, running the vehicle's tag will also identify the vehicle owner, however, the owner may not be driving the vehicle or may be smart enough not to go home.

Even though this device seems promising, there are still operational limitations. First, the officer must close the distance with the fleeing vehicle to discharge the tracking device. Next if the suspect being chased knows his vehicle is tagged, he may quickly abandon the vehicle. Typically, most

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[187]See Appendix G (analyzing strengths and limitations of vehicle taggers).

fleeing suspects abandon their car anyway, leaving police with a recovered vehicle and no suspect. Then what frequently occurs next is that the driver reports the vehicle stolen. If this occurs, unless police can prove otherwise through car video or other means, the driver may be off the hook and the fictitious car thief remains focus of a dead case file. The positive side of the abandoned vehicle is that the suspect no longer poses a danger to the public on the roadway.

Another concern is the cost, which may be prohibitive for smaller agencies. The Committee was unable to get a definite cost estimate at this time from the manufacturer. It is anticipated that the cost will be several thousand dollars per vehicle and then there will be a cost for the communications link. Currently, this system is focused on precommercial testing with the Los Angeles Police Department. Additionally, the manufacturer is working with the National League of Cities on potential grants to deploy the system in another large city.

C. Traffic Preemption

Traffic preemption systems manipulate traffic control devices at the discretion of public safety and are usually involved in some form of emergency response. One system currently being advertised gives any authorized vehicle the capability to move through traffic without unduly disrupting signal synchronization or other traffic. The system is advertised as providing for faster, life-saving 911 response and able to turn any lane into an electronic high occupancy vehicle (HOV) lane for transit vehicles. The system uses infrared technology to grant authorized vehicles momentary right-of-way at signalized intersections. The system reportedly can identify every vehicle on the system, record travel direction and establish vehicle location. Some

jurisdictions have installed these infra-red based traffic signal controls.

As with most of this technology, however, it is currently cost-prohibitive. The good news is that the transmitter device slips into a pre-existing lightbar on the top of the police car. The bad news is that each emitter costs in excess of $1000 per unit. Next, the jurisdiction must consider which intersections to target for this type of control option. Each intersection requires a detector available either as a single channel one direction or single channel dual direction. In addition, jurisdictions must install the cabinet for the power supply on a light pole. The average price is about $415.00 per detector, $1006.75 for the phase selector, $135 for the card rack that mounts in cabinet and detector cable at $0.39 per foot available in 500, 1000, or 2500 foot reels. Adding these costs, it appears that the cost to equip only one police car and one traffic light is approximately $2500.00.

GPS versions are also advertised and are currently being utilized in larger cities such as Houston, Denver and St. Paul. Also noteworthy is the fact that for most of the systems advertised, the company displays fire trucks and ambulances and describes the benefits in terms of emergency vehicle response times. In other words, it appears that this system was designed more with quick passage of emergency vehicles in mind than with stopping a pursuit.

As is the case all too often with new technology, this uncharted territory is again full of potential pitfalls. How to use this technology in a pursuit? Should the officer in a pursuit change the intersection light to red, thus creating traffic congestion as a means of preventing escape? The problem is that this may result in a citizen's vehicle being struck by the suspect. On the other hand, the officer could change the lights to green in the direction of travel of the

pursuit to ensure free passage through intersections for the suspect vehicle and pursuit units. But how does this help end the pursuit? It appears this alternative technology is not only costly, but has sketchy chances of success.

D. Cooperative Systems

Cooperative systems hold the greatest promise in pursuit intervention for the future. Cooperative systems can ultimately disable vehicles as well as record circumstantial events pertaining to unauthorized use. Cooperative systems may be activated by law enforcement to cause a fleeing vehicle to come to a stop.[188]

One such device allows for the remote control of select vehicle operating systems. This device is reported to influence the starter, fuel pump, ignition and 4-way flashers.[189] Part of the attractiveness of this form of intervention includes the sequence of events leading to the stop. For instance, with the appropriate equipment installed, intervention could include a transmitted message that is played over the suspect's stereo system – perhaps even recorded by a 911 dispatch center. With hazard lights activated and a progressively degenerating speed, the driver

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[188]The Memphis Shelby Crime Commission has prepared a chart analyzing the strengths and limitations of three cooperative systems. A copy of this chart is attached hereto as Appendix H.

[189]Other cooperative systems have been considered such as switches mounted at the front or rear of a vehicle sensitive to impact. Such systems are not nearly as viable an option due to the fact that the courts have ruled that ramming a vehicle is deadly force. Hence such systems could only be utilized when the suspect is created a risk of death or serious bodily injury to the officer or others. Additionally, the notion of having a police cruiser bump into the front or rear of a suspect vehicle such as a large truck is far from appealing.

would have no recourse but to pull off the side of the road. The vehicle is then out of commission thus presenting no danger to other drivers.

Placing a small radio receiver in a vehicle to disable the vehicle (a "kill switch") is easy. Enacting the legislation that would mandate this installation of the kill switch is another matter. Law enforcement could certainly anticipate protests by groups claiming that such legislation raises the specter of an Orwellian society where all vehicles are subject to being stopped by police electronically.

Cooperative systems could be very useful in preventing or at least ending police pursuits quickly and safely. Also worthy of consideration is the impact to society in terms of homeland security. Utilizing such systems in large trucks and tractor-trailers involved in transporting materials could ensure the ability to stop these vehicles in cases of drivers who fail to comply with the law regarding the transport of hazardous chemicals or if the truck is hijacked by terrorists.

This technology is feasible, particularly for the engine control aftermarket systems; however, vendors are engaging in little development. What would spur this development? The answer is simple: legislation requiring this type of technology in all vehicles.

As always with all new technology (recall the furor over OC spray and the current controversy over the use of the Taser), there will always be protests from citizens who are fearful that society is becoming Orwellian. And of course, there must be laws regulating the use and punishing misuse of the technology. An existing model to consider is the state and federal laws protecting access to criminal history data that is collected by the states and the National Crime Information Center (NCIC). The laws set forth criminal and

administrative sanctions for misuse and also require periodic audits to ensure compliance.

In terms of an initial step, perhaps the greatest potential for use of these systems will come from the privately owned fleets of vehicles (such as trucks and rental cars). The companies that own such fleets may appreciate the benefits of cooperating with law enforcement and also reduce their losses due to theft by equipping their vehicles with cooperative systems.

E. Electrical Systems

Electrical systems are categorized as either radiative or direct injection. Direct injection systems require contact with the target vehicle and radiative systems do not. Electrical energy from a stored source can be discharged through wires emanating from a device causing current to pass through the frame and engine ground paths. The current that is passed from the battery through the wires disables the electronic components of the target vehicle. This can be either in the form of a pre-emplaced platform or a package launched at the pursued vehicle. Public concerns over launched rocket-type devices have thus far pre-empted any wide-spread fielding of a direct injection product, although some testing has been accomplished.

Two such devices are reportedly in existence: the Road Patriot (launchable) and the Road Sentry (stationary). The Committee conducted an internet search for information regarding both systems and was unable to locate any information. Consequently at the time of this publication, the status of these seemingly obscure devices is unknown.

One concept has already made it beyond prototype development and offers the end-user with the option of

deployment during permanent access points, mobile road checkpoints and portable systems. A direct injection device is now commercially available. The manufacturer has performed proof-of-principle demonstration tests with a laboratory pulsed-power supply. The device has also been demonstrated on real vehicles for the Colorado State Patrol, Colorado Springs Police, United States Department of Transportation, United States Customs, Drug Enforcement Agency, United States Border Patrol, the United States Attorney General's Office, the Army Research Laboratories, and numerous news media groups.

It works by injecting relatively large electromagnetic pulses into the sensitive ignition and engine-control electronics of vehicles, damaging or disrupting the electronics, and causing the vehicle to come to a stop or be inoperable. According to the manufacturer, the vehicle cannot be restarted until the damaged electronics are replaced. If the vehicle is moving, once the electronics are damaged, the vehicle coasts to a safe stop as if it had run out of gas.

According to the advertisements, the use of current pulse power technology and packaging for simplified operation should result in a power supply package less than six cubic feet. That, however, is too large to fit in the front seat of the typical patrol vehicle. Command activation is accomplished with a wire or remote control radio frequency transmission, similar to that used for auto alarm systems. Two systems are currently being advertised, one portable and one stationary. The portable version appears much more feasible and uses a pad or hose rolled across the highway where the suspect car will run over it, similar to the way stop-sticks are deployed today. Once the system is armed by an officer, the next vehicle to pass over the pad triggers the electric charge. As with stop-sticks, police must first anticipate the most likely route of the pursuit, outrun the fleeing suspect and get to a

vantage point to deploy the device. Again, without a significant deployment of officers constantly vigilant at key locations, even this simple device is not feasible.

It is worth mentioning that in the future, radiative technology may represent the ultimate in pursuit intervention technology. The prototypical radiative device will allow police to target a suspect vehicle and with a pulse of energy (usually microwave), shut down the electronic components of an engine. The Army Research Laboratory is conducting initial testing on such a system. These systems will be more reliable than smart technology, safer than stop sticks, more selective than traffic control and immediately available to the officer . . . some day.

F. Summary of Technology

It is apparent from this review that technology exists or is in development that will ultimately enable law enforcement to stop vehicles driven by suspects who are fleeing from law enforcement. Stopping the pursuit quickly and without the vehicle losing control will result in fewer injuries and deaths to citizens and law enforcement. The problem is simply that, with the exception of stop-sticks, this technology is costly and/or not fully operational as yet. Additionally, the deployment of the mechanical devices like stop-sticks requires a number of officers and is simply not feasible in rural jurisdictions. Whether the ultimate solution is controlled intervention systems in all vehicles or radiative systems deployed by officers, law enforcement needs to stay abreast of the technology and continue to support this research.

VII. Conclusion and Recommendations

The Committee concludes that police pursuits may be

required in certain circumstances; however, the Committee also recognizes that police pursuits can result in injuries or death to innocent persons, suspects and officers. In an effort to avoid this, Georgia law requires that the officer drive with "due regard for the safety of all persons"[190] during the pursuit. In order to ensure that officers drive with the requisite due regard, the Committee makes the following recommendations:

> *Policy*: Law enforcement agencies should promulgate a policy governing pursuits that sets forth guidelines to assist the officer in pursuing with due regard for the safety of the public. The agency's pursuit policy may be either a judgmental or a restrictive policy. Regardless of which type of pursuit policy is chosen, the officer should always weigh the risks of the pursuit versus the immediate or potential danger to the public should the suspect remain at large. At all times during the pursuit, the need to apprehend the suspect must outweigh the level of danger created by the pursuit. The agency's pursuit policy should be specifically tailored to the size, location and mission of the agency and should provide guidance in the specific areas discussed earlier in this paper.
>
> *Training*: In addition to the training officers receive in mandate school, agencies should provide periodic training regarding their agency's pursuit policy to their officers.

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[190]O.C.G.A. § 40-6-6(d)(1)/

Reporting: Agencies should require officers to report every time they engage in a pursuit, as well as when a pursuit is initiated but discontinued by the officer. The supervisor on duty during the pursuit should also review the report and provide information regarding the pursuit. These reports should be periodically reviewed by agency heads because they may reveal patterns or trends that could indicate training needs and/or policy modifications.

In addition to these recommendations, the Committee is encouraged by the Georgia Tech research project, as well as the experience of the Georgia State Patrol in using the PIT maneuver. When properly performed by a trained driver under certain conditions, the PIT maneuver is a controlled, predictable technique to stop a pursuit thus eliminating the danger to the public from the pursuit. The use of the PIT maneuver is not likely to, nor is it intended, to cause death or serious injury. Consequently, the Committee concludes that the use of the PIT maneuver, unlike a ram, is not deadly force. The Committee recommends that the PIT maneuver only be utilized by officers who have received training in its use. Additionally, agencies should provide clear guidance in their policy regarding when and under what conditions the PIT maneuver may be used.

The Committee is somewhat optimistic about the possibility of technology some day eliminating the need for pursuits at all. The Committee strongly supports the development of technology such as tracking devices and cooperative systems that will safely disable vehicles. Perhaps in the near future, an officer will have the ability to activate a device that will disable the vehicle when a suspect does not accede to the officer's authority. When such technology becomes a reality, the suspect can no longer present a danger to the public by

choosing to flee from law enforcement.

The issue of police pursuits will always require much thought on the part of policymakers. A very astute observation, which originated from a National Institute of Justice study of police pursuits, sums up the dilemma created by police pursuits:

> On the one hand too many restrictions placed on police use of pursuit could place the public at risk from dangerous individuals escaping apprehension. On the other hand, insufficient controls on police pursuit could result in needless accidents and injuries.[191]

Policymakers must ensure that their pursuit policy considers not only the risk of the pursuit, but also the danger to the public from the suspect escaping.

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[191] Alpert, Geoffrey P., *Police Pursuit: Policies and Training*, National Institute of Justice Research in Brief at 1 (May 1997).

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No. 05-1631

In the Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF, PETITIONER,

v.

VICTOR HARRIS, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, HAWAII, IDAHO, INDIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA AND WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
MICHAEL SCODRO
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

[additional counsel listed on signature page]

QUESTIONS PRESENTED

1. Whether it is "objectively reasonable" under the Fourth Amendment for a police officer to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper when the suspect has demonstrated that he will continue to drive in a reckless and dangerous manner that puts innocent lives at risk.

2. Whether, at the time of the incident, it was "clearly established" that an officer's terminating a dangerous high-speed chase by bumping the fleeing suspect's vehicle with his push bumper violated the suspect's Fourth Amendment rights.

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INTEREST OF THE *AMICI CURIAE*

This case presents two questions—whether petitioner seized respondent in violation of the Fourth Amendment and, if so, whether the Fourth Amendment right in question was "clearly established" at the time of petitioner's conduct. These questions reflect the two stages of the qualified immunity inquiry under *Saucier v. Katz*, 533 U.S. 194 (2001), which categorically requires federal courts first to resolve whether the plaintiff has alleged the violation of a cognizable constitutional right before determining whether that right was clearly established and, therefore, whether the defendant enjoys qualified immunity.

Amici States respectfully urge this Court to revisit and abandon *Saucier*'s rigid, two-step process for resolving qualified immunity claims. As shown below, and as petitioner ably demonstrates, petitioner is entitled to immunity under the second *Saucier* prong because, taking the facts in the light most favorable to respondent, petitioner's conduct did not violate any clearly established Fourth Amendment right. In cases like this one, where it is plain that the constitutional right in question was not clearly established at the time of the defendant's conduct, requiring courts to undertake the first *Saucier* inquiry and resolve the merits of the plaintiff's constitutional claim places needless burdens on courts and litigants, can require courts to make novel constitutional rulings without thorough briefing or a sufficient record, and often insulates such rulings from review.

Because state officers and employees regularly are defendants in actions brought under 42 U.S.C. § 1983, Amici States have a strong interest in how federal courts decide whether state defendants are protected by qualified immunity. The States also have a substantial interest in how federal courts define and develop the constitutional limits on official conduct.

In this regard, *Saucier*'s strict, two-step sequence not only makes litigation more burdensome, but also increases the likelihood of erroneous constitutional pronouncements that may be immune from appellate review.

Amici States also have a substantial interest in the merits of this case and a critical stake in the lower courts' correct implementation of qualified immunity doctrine. The doctrine, which requires plaintiffs to show that their asserted constitutional rights were "clearly established," not "at a high level of generality," but "in a more particularized, and hence more relevant, sense," *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (internal quotation marks omitted), was incorrectly applied by the Court of Appeals in this case.

STATEMENT

Because this case comes to the Court from the denial of petitioner's motion for summary judgment, all facts are taken in the light most favorable to respondent.

1. On March 29, 2001, a Coweta County deputy attempted to pull over respondent Victor Harris for speeding. Pet. App. 2a. Rather than stop his vehicle, Harris fled, driving between 70 and 90 miles per hour, through two red traffic lights, and crossing double yellow lines into the oncoming lane. *Ibid.* At one point, Harris collided with petitioner Timothy Scott's patrol car. *Id.* at 3a & n.1. Ultimately, after a chase lasting six minutes and covering nine miles, Scott used his car to bump Harris's vehicle. *Id.* at 2a, 4a. The contact caused Harris to lose control of his car and to crash, resulting in serious injuries. *Id.* at 4a.

2. On October 16, 2001, Harris filed suit under 42 U.S.C. § 1983 against Scott, other police officers, and Coweta County. Pet. App. 35a. Harris alleged, among other things, that Scott used excessive force when bumping Harris's vehicle, thereby

seizing him in violation of the Fourth Amendment. *Id.* at 6a, 35a. Defendants moved for summary judgment. *Id.* at 35a. In relevant part, the district court denied Scott qualified immunity from Harris's Fourth Amendment claim. *Id.* at 41a-42a.

3. The Court of Appeals affirmed. In accordance with *Saucier v. Katz*, *supra*, the court evaluated Scott's qualified immunity claim in two stages, first asking whether "the facts alleged show the officer's conduct violated a constitutional right," and then examining "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal law." Pet. App. 6a (internal quotation marks omitted).

The court answered both questions in the affirmative. *Id.* at 6a-22a. With respect to the second *Saucier* prong, the court concluded that Harris's Fourth Amendment theory was "clearly established" by the time of the high-speed chase, albeit only after conceding that it was relying on "a general constitutional rule" rather than more particularized authority. *Id.* at 20a. Specifically, the court found that Scott's conduct violated broad principles that seizures "of a fleeing suspect [must] be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force," and that "reasonableness" depends in part on "a 'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue.'" *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

This case provides an opportunity to reconsider the strict two-step framework mandated by *Saucier* for resolving qualified immunity claims, a framework that "a majority of the Justices have questioned * * * in recent years." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). Requiring courts to decide whether a § 1983 plaintiff has stated a cognizable constitutional claim in every

case before permitting analysis of whether such a claim was "clearly established" (1) imposes unnecessary burdens on courts and parties; (2) threatens to insulate many constitutional rulings from review on appeal; (3) requires courts to make constitutional pronouncements even where one or both parties have not argued the point thoroughly or the record is inadequate; and (4) is unnecessary to ensure the continued development of constitutional doctrine and, ironically, actually threatens to undermine this goal. Accordingly, Amici States respectfully urge the Court to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims.

In addition, Amici States urge this Court to reverse the judgment below and, in so doing, to reinforce the principle—disregarded by the Court of Appeals—that government defendants lack qualified immunity only where the constitutional right at issue was "clearly established" in a sufficiently "particularized" way. *Brosseau*, 543 U.S. at 198-199.

ARGUMENT

The qualified immunity doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, *supra*, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the plaintiff has alleged the violation of a cognizable constitutional right; second, if the plaintiff has alleged such a right, the court must decide whether that right was "clearly established" at the time of defendant's alleged misconduct. 533 U.S. at 201.

Amici States argue two points here. First, *Saucier*'s rigid two-step framework causes a host of problems for courts and

litigants and threatens the integrity of constitutional decisionmaking. This case presents an opportunity to reconsider the requirement that courts deploy the two-step sequence in every case. Second, with respect to the instant case, the Court of Appeals erred in holding that Harris's alleged Fourth Amendment right was "clearly established" without requiring plaintiff to make the more particularized showing that this Court's precedents demand. Under the proper standard, Scott was entitled to qualified immunity.

I. Courts Should Not Be Required To Resolve The Underlying Constitutional Question Whenever A Government Official Raises A Qualified Immunity Defense.

In a series of decisions prior to *Saucier*, this Court articulated the aforementioned two-step procedure for resolving qualified immunity claims. See, *e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."). In *Saucier*, the Court expressly held that the two-step framework was not simply recommended, but mandated for use in all qualified immunity cases: "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence." 533 U.S. at 200. At the "threshold," the court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next,

sequential step is to ask whether the right was clearly established." *Ibid.*[1]

For the following reasons, this Court should no longer mandate this two-step procedure, and instead should permit federal courts to grant qualified immunity without first deciding the merits of the plaintiff's constitutional claim.

A. The Mandatory, Two-Step Framework Has Drawn Criticism From Members Of This Court, And Lower Courts Have Sought To Limit Its Effect.

Both before and after *Saucier*, several Members of this Court have expressed strong opposition to imposing a mandatory, two-step "order of battle" whenever a government official seeks qualified immunity. See *Lewis*, 523 U.S. at 858-

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[1] In part to protect government officials who make reasonable, but mistaken, judgments, some courts of appeals characterize the inquiry as a three-step, rather than a two-step, process. The Second Circuit, for example, states that it has "further refined the second inquiry" into two subparts, granting qualified immunity whenever "the defendant's action did not violate clearly established law" *or* where "it was objectively reasonable for the defendant to believe that his action did not violate such law." *Poe v. Leonard*, 282 F.3d 123, 132-133 (2d Cir. 2002) (internal quotation marks omitted); see also, *e.g.*, *Swiecicki v. Delgado*, 463 F.3d 489, 497-498 (6th Cir. 2006) ("[T]his court occasionally performs a third step," which "requires inquiry into whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.") (internal quotation marks omitted); *Tremblay v. McClellan*, 350 F.3d 195, 199 (1st Cir. 2003) (third inquiry is "whether a reasonable officer could have concluded that his actions did not violate plaintiffs' constitutional rights").

859 (Breyer, J., concurring) (stating that *Siegert v. Gilley*, 500 U.S. 226 (1991), "should not be read to deny lower courts the flexibility, in appropriate cases, to decide 42 U.S.C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented"); *id.* at 859 (Stevens, J., concurring) (two-step approach is appropriate "when the answer to the constitutional question is clear" but not when "the question is both difficult and unresolved"); *Bunting v. Mellen*, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg & Breyer, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id.* at 1025 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review * * * or else drop any pretense at requiring the ordering in every case.") (emphasis in original); *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle,'" which "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court"); *id.* at 202 (Stevens, J., dissenting) ("When * * * the applicable constitutional rule is well settled, 'we should address the constitutional question at the outset.'"); see also *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.").

At the same time, lower courts have nibbled at the rule's edges in certain defined circumstances. For example, in a case involving an ambiguous state statute, the First Circuit granted qualified immunity to the defendant without first resolving, under *Saucier*'s first prong, whether the defendant's conduct violated the constitution; justifying its course, the court stated that "[a]lthough *Saucier* can be read as encouraging federal courts to decide unclear legal questions in order to clarify the law for the future, it surely did not mean to require federal courts to define and clarify unclear state statutes when this is wholly unnecessary to decide the case at hand." *Tremblay*, 350 F.3d at 200. Likewise, when presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to "bypass *Saucier*'s first step and decide only whether [the alleged right] was clearly established." *Motley v. Parks*, 432 F.3d 1072, 1078 & n.5 (9th Cir. 2005). And in an appeal where the district court granted judgment to the defendant under Fed. R. Civ. P. 50 on qualified immunity grounds while skipping the first prong, the Third Circuit elided the first prong as well, stating its belief "that the circumstances here * * * are sufficiently unlike those in *Saucier* and *Siegert* that we may proceed directly to the qualified immunity issue without ruling preliminarily on the constitutional violation claim." *Carswell v. Borough of Homestead*, 381 F.3d 235, 241 (3d Cir. 2004), *cert. denied*, 126 S. Ct. 236 (2005).

Other lower courts have departed from the *Saucier* protocol on more general terms, without articulating a justification based upon the particular circumstances of the case. See, *e.g.*, *Cherrington v. Skeeter*, 344 F.3d 631, 640 (6th Cir. 2003) ("[I]t ultimately is unnecessary for us to decide whether the individual Defendants did or did not heed the Fourth Amendment command * * * because they are entitled to qualified immunity in any event."); *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir. 2002) ("[W]e retain the

discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all."); see also *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) ("[w]hether this rule is absolute may be doubted"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275, 1277 (2006) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that "involves so many and such serious problems that I am not sure where to begin").

The lower courts' noncompliance with *Saucier*'s mandatory framework has not escaped attention. Two years ago, Justice Scalia observed that the "understandable concern" with *Saucier* "has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory." *Bunting*, 541 U.S. at 1024 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) (citing cases). Shortly after that observation—and notwithstanding the caveat that the *Saucier* protocol was mandatory—the full Court in *Brosseau* unanimously resolved a § 1983 damages case under *Saucier*'s second prong, without resolving under the first prong whether the plaintiff had alleged a constitutional violation. 543 U.S. at 198. In so doing, the Court stated that it had "no occasion * * * to reconsider [its] instruction in *Saucier* * * * that lower courts decide the constitutional question prior to deciding the qualified immunity question," explaining that it had granted certiorari only "to correct a clear misapprehension of the qualified immunity standard." *Id.* at 198 n.3. Here, by contrast, the Court granted certiorari on both prongs of the *Saucier* analysis, which makes this case an appropriate one to reassess *Saucier*'s rule that courts must address the first prong before reaching the second.

B. *Saucier* Forces Courts To Make Unnecessary Constitutional Rulings, While Insulating Many Of These Decisions From Further Review.

Requiring courts to decide the merits of a § 1983 plaintiff's constitutional claim—even where the defendant obviously enjoys qualified immunity because the constitutional right in question indisputably was not "clearly established" at the time of the alleged misconduct[2]—departs from the fundamental principle that courts should render constitutional decisions only where doing so is essential to decide the case. See *Lewis*, 523 U.S. at 841 n.5 (acknowledging two-step protocol as an exception to "the generally sound rule of avoiding determination of constitutional issues"); see generally *Ashwander v. TVA*, 297 U.S. 288, 347 (1923) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Commencement Address of Chief Justice John G. Roberts, Jr., Georgetown Law School (May 21, 2006) ("If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.") (webcast available at www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144).[3]

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[2] For example, if the defendant's conduct had been held unconstitutional by five circuits and constitutional by five others, then the defendant indisputably would be entitled to qualified immunity under *Saucier*'s second prong despite the difficulty of resolving under the first prong whether the conduct itself was unconstitutional.

[3] "Outside of the qualified-immunity context, [there is] just one setting in which federal courts must address constitutional questions before non-constitutional questions—when they adhere

On its own, this longstanding principle of judicial restraint counsels in favor of permitting courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question. *Lewis*, 523 U.S. at 859 (Stevens, J., concurring) ("When * * * [the constitutional] question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."). The Second Circuit cited the virtue of judicial restraint to justify exercising its "discretion to refrain" from undertaking the first step of the *Saucier* test. *Koch*, 287 F.3d at 166 ("This procedure avoids the undesirable practice of unnecessarily adjudicating constitutional matters."); see also *Kalka v. Hawk*, 215 F.3d 90, 97 (D.C. Cir. 2000) (criticizing mandatory two-step approach in part because it offends principle that "[f]ederal courts should not decide constitutional questions unless it is necessary to do so").

Saucier not only requires courts to make unnecessary constitutional holdings, but also insulates many such holdings from further review. See *Brosseau*, 543 U.S. at 202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (observing that two-step rule "can sometimes lead to a constitutional decision that is effectively insulated from review"). This occurs when a court holds that the defendant's conduct violated a cognizable constitutional right, but proceeds to grant judgment to the defendant because that right was not clearly established. As the

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to the Article III requirement that they resolve jurisdictional issues before merits issues—and that issue plainly does not apply" in the qualified immunity context. *Lyons*, 417 F.3d at 581 (Sutton, J., concurring); see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). This exception for jurisdictional questions is necessary because, "unless Article III standing is satisfied, the court has no power to rule on the other issues in the case." Leval, *supra*, at 1277 n.83.

prevailing party, the defendant cannot appeal or seek certiorari review from the adverse constitutional ruling. See *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir.) ("The government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts."), *cert. denied*, 528 U.S. 1052 (1999); *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) ("[S]ome constitutional rulings effectively will be insulated from review by the *en banc* court of appeals or the Supreme Court where the appellate panel identifies a constitutional violation but grants qualified immunity under the second inquiry."); *Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2004) (Cardamone, J., concurring in part, dissenting in part) (observing that inability to appeal constitutional ruling when defendant prevails on qualified immunity "is, of course, an inescapable result of the sequential order of the *Saucier* inquiry").

The problem and its consequences are illustrated by *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004). Following the *Saucier* procedure, the Fourth Circuit first held that the Virginia Military Institute's use of the word "God" in a "Supper Roll Call" ceremony violated the Establishment Clause, but then granted the defendants qualified immunity because the law was not clearly established at the relevant time. *Id.* at 365-376. Although they had the judgment, the defendants sought certiorari review of the adverse constitutional ruling. Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." *Bunting*, 541 U.S. at 1022. The "tangle" arose from the Court's "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, which insulated from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id.* at 1023; see also *Kalka*, 215 F.3d at 96 n.9 (noting that "[n]ormally, a party may not appeal

from a final judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court").

In cases like *Bunting*, the "prevailing" defendant faces an unenviable choice: "comply[] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "defy[] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential "punitive damages." *Horne*, 191 F.3d at 247-248. This result is patently unfair to government officials and the governments they serve, for an unreviewable constitutional holding announced by a court of appeals under *Saucier*'s first prong may in the future be held to have "clearly established" the constitutional standards with which state and local officials must comply.

C. *Saucier*'s Mandatory, Two-Step Rule Burdens Courts And Litigants, And Requires Constitutional Decisionmaking Without Sufficient Argument Or Record Evidence.

"[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense." *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring). The *Saucier* rule requires courts to delve into and decide constitutional disputes in every case, even those easily resolved under the second prong for lack of any "clearly established" right. See *Horne*, 191 F.3d at 249 ("For a judiciary that is already heavily burdened with cases it *must* decide, offering an unnecessary but simple solution to an easy problem is better justified than undertaking unnecessarily to untangle a difficult, complex issue.") (footnote omitted); *DiMeglio v. Haines*, 45 F.3d 790, 799 (4th Cir. 1995) ("courts should be free to decide the case on the most expedient ground").

Saucier also requires defense counsel to advance potentially complex constitutional arguments on the first *Saucier* prong, even where counsel is confident of winning the case on the second prong. Adding to counsel's time, and defendant's expense, in this way undermines the very purpose behind the qualified immunity doctrine—to shield official defendants from "the burdens of litigation." *Brosseau*, 543 U.S. at 198; see also *DiMeglio*, 45 F.3d at 798 ("requiring that courts conduct a * * * would threaten to increase the burden of defending suits for public officials whose conduct was reasonable, by expanding the number of issues officials must prepare to address, brief, and argue").

Experience teaches that some parties will rationally choose to devote little time and effort to the constitutional issue presented in step one. *Motley*, 432 F.3d at 1077 ("The parties urge us to skip the first step of the *Saucier* analysis. They ask us to assume that the officers violated Motley's constitutional rights * * * and determine whether those rights were clearly established at the time of the search."); *Vives*, 405 F.3d at 118 n.7 ("We do not reach the constitutional question because we are reluctant to pass on the issue in dicta and because the parties did not genuinely dispute the constitutionality of [the challenged law] either in the District Court or on appeal."); *African Trade & Info. Ctr. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir. 2002) (skipping to second step of analysis because, *inter alia*, "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed"); *Powers v. CSX Transp., Inc.*, 105 F. Supp. 2d 1295, 1308 (S.D. Ala. 2000) (citing, among reasons for skipping first step, fact that "the parties' briefing on the constitutional and statutory issues is not merely poor but essentially non-existent," which may be the product of the parties' "enlightened self-interest").

The reason for this is not difficult to ascertain. Individual defendants in § 1983 suits, particularly those employed by municipalities, are often represented by private counsel, who collectively have less interest in the long-term effects of an adverse constitutional ruling than in winning the case as efficiently and inexpensively as possible. See generally *Horne*, 191 F.3d at 247 ("[P]arties may do an inadequate job briefing and presenting an issue that predictably will have no effect on the outcome of the case."). For the same reason, even if it were somehow possible for prevailing defendants to appeal from an adverse constitutional ruling on *Saucier*'s first prong, see *supra* pp. 11-13, such defendants often will have no incentive to do so, and the plaintiff (having lost on the "clearly established" prong) may have no incentive to defend the lower court's constitutional decision. See Leval, *supra*, at 1279 ("Even if the defendant officer could appeal from the dictum, in many cases he would not do so. He has won the case. * * * [E]ven if the defendant did care and did appeal, at this point the plaintiff would likely have no interest in the appeal.").

For courts, too, the fact that a constitutional question has no impact on a case's outcome may detract from the quality of its decisionmaking. See *Horne*, 191 F.3d at 247 ("Judges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication."). As Judge Leval recently explained in concluding that "*Saucier* is a blueprint for the creation of bad constitutional law":

> [T]he fact is, in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price.

Leval, *supra*, at 1278-1279 (footnotes omitted).

Compounding these problems is the fact that *Saucier* compels courts to make constitutional decisions on an inadequate record. Settled precedent encourages defendants to raise qualified immunity early in litigation, including on a motion to dismiss, for "the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (emphasis in original) (internal quotation marks omitted); see also *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Yet raising the defense early can force courts to render highly abstract constitutional decisions "on a nonexistent factual record, even where * * * discovery would readily reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). A government official's decision to assert qualified immunity early in the litigation therefore may result in "the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed." *Ibid.* As the Second Circuit noted in one such case,

> Given the scant record before us (as is common in appeals from summary judgment based on qualified immunity), we are faced with three possible courses of action: (1) reach out on an inadequate record to announce a view, in dictum, on a constitutional question whose resolution is unnecessary to decide the case, (2) remand to the district court and direct the district court to require the parties to participate in further proceedings that will have no bearing on the result of their case, or (3) decline to express a view on the underlying constitutional question since we lack

> adequate information to do so. We think it clear that the third option is the preferable one.

Mollica v. Volker, 229 F.3d 366, 374 (2d Cir. 2000).

In sum, *Saucier* not only requires courts to abandon traditional notions of restraint and resolve constitutional questions unnecessarily, but often does so under unfavorable conditions, without adequate argument from one or both parties, without an adequate record, or without the benefit of appellate review. So, "[j]ust as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, so there is a risk that constitutional questions may be prematurely and incorrectly decided where they are not well presented." *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) (citation omitted).

D. Requiring Courts To Decide Constitutional Claims In Every § 1983 Case Is Not Necessary To Develop The Law.

The Court justified its departure from the usual practice of avoiding non-essential constitutional rulings because "if the policy of avoidance were always followed in favor of ruling on qualified immunity * * *, standards of official conduct would tend to remain uncertain." *Lewis*, 523 U.S. at 841 n.5; see also *Saucier*, 533 U.S. at 201 ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."); *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."). But assuring the law's development does not require courts to make constitutional pronouncements in every case; it merely counsels against *prohibiting* courts from doing so. See *Lyons*, 417 F.3d

at 581 (Sutton, J., concurring) ("All of this, however, just proves that the 'better approach' in this area is to resolve the first inquiry before the second one. It does not prove that the approach should be followed in all cases, and indeed a majority of the Justices have questioned the value of this strict requirement in recent years.") (citation omitted).

Abandoning *Saucier*'s mandatory, two-step "order of battle" does not mean categorically *forbidding* courts from deciding whether § 1983 plaintiffs have alleged cognizable constitutional rights. In many cases, deciding the constitutional question first will be the preferred course. "The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Ibid.* And "[a]dressing a more concrete issue (was there a constitutional violation?) before turning to a more abstract issue (was it clearly established?) will generally present an easier mode of analysis than approaching matters the other way around." *Id.* at 583.

Introducing this flexibility would permit courts to resolve cases solely on the second, "clearly established" step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so. See *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties."). There are a number of circumstances where such an approach would make sense:

> What of the district court that faces a complaint alleging dozens of constitutional violations? * * * What of the appellate panel facing a set of briefs in which the constitutional question is not only difficult but

> inadequately briefed? * * * And what of other settings: the appellate panel that cannot agree on the appropriate resolution of the constitutional question but can readily agree on the resolution of the clearly established question; the panel faced with a poorly presented constitutional question but an easily resolved clearly established question; the panel faced with a constitutional question that is not only difficult but highly fact specific and therefore unlikely to provide meaningful guidance in future cases; or the panel faced with a constitutional question that is essentially irrelevant to the case at hand because of significant intervening developments in the law?

Lyons, 417 F.3d at 582 (Sutton, J., concurring) (internal citation omitted).

Moreover, constitutional law does not depend for its development on cases where the defendant may seek qualified immunity. Constitutional issues arise in innumerable cases where there is no qualified immunity, such as criminal cases where the defendant seeks to suppress evidence, § 1983 cases against a municipality, or § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis*, 523 U.S. at 841 n.5 (noting that qualified immunity is unavailable "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion"); *Virgili v. Gilbert*, 272 F.3d 391, 394 (6th Cir. 2001) (relying solely on "clearly established" prong to decide in defendants' favor, "not[ing] that ample opportunities exist to establish [the constitutional] standard via other means, for example through actions for declaratory or injunctive relief"); *Charles W. v. Maul*, 214 F.3d 350, 357 (2d Cir. 2000) ("[T]he Court should not determine the existence of the constitutional right alleged if the question could be decided in proceedings in which qualified immunity is not a defense."); *Santamorena v.*

Georgia Military College, 147 F.3d 1337, 1344 n.16 (11th Cir. 1998) ("Refraining (until truly necessary) from deciding—in qualified immunity cases—the more perplexing federal law issues will not inevitably preclude the law in due course from becoming clearly established. Suits seeking injunctions, suits against local governments, and certain criminal proceedings can settle the law."); Leval, *supra*, at 1280-1281 (even without *Saucier*'s rule, repeated conduct is "not likely to repeatedly escape review," for good faith immunity "does not apply, for example, where an injunction is sought to prevent repetition of the conduct, * * * where the suit is against a municipality based on municipal policy," or "where suppression of evidence is sought").

In sum, there is no reason to presume that constitutional law would stand still if courts enjoyed the discretion to deviate from the *Saucier* rule in certain cases. As Judge Sutton explained,

> The same risk exists in other areas of law * * * . And yet the ability of courts to skip to the second inquiry (*e.g.*, to go straight to the harmlessness of the error or *Teague's* new-rule inquiry * * *) does not seem materially to have inhibited the development of constitutional law.

Id. at 583. The same could be said of how federal courts resolve habeas cases under 28 U.S.C. § 2254(d)(1), which asks not whether the state criminal court's constitutional ruling was correct on the merits, but whether it was contrary to or an objectively unreasonable application of clearly established law established by this Court's precedents. See *Carey v. Musladin*, 549 U.S. ___, slip op. at 4, 6-7 (2006). The same also could be said of how courts resolve ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), which expressly allows such claims to be rejected solely under the prejudice prong without consideration of whether the

attorney's performance was constitutionally inadequate. *Id.* at 697. Constitutional criminal law has continued to develop after Congress enacted § 2254(d)(1), see *Musladin*, slip op. at 2-3 (Kennedy, J., concurring) (agreeing that relief unavailable under § 2254(d)(1) because the constitutional rule invoked by habeas petitioner "has not been clearly established by our cases to date," but urging that the rule "be explored in the court system, and then established in this Court"), as have the standards governing the performance of defense counsel after *Strickland*, and constitutional law governing the conduct of government officials will develop as well even absent *Saucier*.

E. Abandoning the *Saucier* Rule Would Not Offend Principles of *Stare Decisis*.

Although the Court "approach[es] the reconsideration of [its] decisions * * * with the utmost caution," "[*s*]*tare decisis* is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, the existing rule does not achieve its own aim and causes a host of collateral problems, and the precedent has been criticized by several Members of this Court, unevenly applied by the Court, and narrowed and even disregarded by the courts of appeals.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases * * * involving procedural and evidentiary rules." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Like procedural and evidentiary rules, *Saucier*'s two-step protocol does not affect the way that parties order their affairs. Abandoning *Saucier*'s categorical rule would not upset settled expectations on

anyone's part. See *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

Nor does this matter implicate "the general presumption that legislative changes should be left to Congress." *Khan*, 522 U.S. at 20. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Not so here. Because the *Saucier* rule is judge-made, only this Court can change it.

Moreover, the "Court has never felt constrained to follow precedent" "when governing decisions are unworkable or badly reasoned." *Payne*, 501 U.S. at 827 (internal quotation marks omitted). For the reasons set out above (*supra* pages 9-20), a mandatory, two-step rule for resolving all qualified immunity claims has had unforeseen, adverse collateral consequences, is unnecessary to advance the goal put forth as its justification, and in fact undermines that goal to a certain extent.

Finally, several Members of this Court have criticized the *Saucier* rule, the full Court recently declined to follow it in *Brosseau*, and courts of appeals have sought to narrow the rule or disavow it altogether. See *supra* pp. 6-9. These factors, too, make reconsideration appropriate. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) ("Members of this Court * * * have suggested that we revise our doctrine * * * ."); *Hohn v. United States*, 524 U.S. 236, 252 (1998) (overturning precedent that "has often been disregarded in our own practice"); *Payne*, 501 U.S. at 829-830 (overturning past decisions of the Court that had "been questioned by Members of the Court in later decisions, and [had] defied consistent application by the lower courts").

* * *

Saucier's rigid, two-step formula imposes burdens on courts and litigants, threatens to detract from the quality and coherence of constitutional decisionmaking, and is wholly unnecessary to achieve its stated purpose. Accordingly, Amici States respectfully urge the Court to abandon the rule as a requirement for use in every qualified immunity case.

II. The Court of Appeals' Judgment Should Be Reversed On Qualified Immunity Grounds.

As petitioner's brief demonstrates, the Court of Appeals erred in holding that Harris's alleged constitutional right was "clearly established" and that Scott's qualified immunity defense therefore failed. General constitutional standards are rarely sufficient to show that a right is "clearly established"; the right must be established "in a more particularized, and hence more relevant, sense." *Brosseau*, 543 U.S. at 198-199 (2004) (internal quotation marks omitted). The Court of Appeals denied qualified immunity to Scott only by relying on inadequate, general standards.

The court cited *Tennessee v. Garner*, 471 U.S. 1 (1985), for the proposition that "the Fourth Amendment requires a seizure of a fleeing suspect to be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force," and quoted *Graham v. Connor*, 490 U.S. 386, 396 (1989), for the principle that "reasonableness" in this context depends in part on "a 'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue.'" Pet. App. 16a-17a. The court conceded that it was relying on "a general constitutional rule" rather than more specific, factually related authority. *Id.* at 20a. But this Court's broad statements in *Graham* and *Garner* are insufficient in themselves to "clearly establish" Fourth Amendment rights, except in cases so obvious that factually

analogous authority is unnecessary—an exception that the Court of Appeals properly declined to invoke. *Id.* at 28a n.15.

In fact, the Court of Appeals made precisely the mistake that the Ninth Circuit made in *Brosseau* when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*," tests that "are cast at a high level of generality." *Brosseau*, 543 U.S. at 199; see also *Wilson*, 526 U.S. at 615 ("It could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police," but "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). In reversing the Ninth Circuit's judgment denying qualified immunity to a police officer who used deadly force to stop a fleeing suspect, this Court reaffirmed the need for more specific notice:

> [T]here is no doubt that *Graham* * * * clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [*v. Creighton*, 483 U.S. 635 (1987)], that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Brosseau, 543 U.S. at 198-199 (internal quotation marks omitted). Indeed, general standards are particularly deficient where, as here, the constitutional "area is one in which the result depends very much on the facts of each case." *Id.* at 201.

Had the Court of Appeals adhered to settled qualified immunity standards, it would have granted qualified immunity

to Scott on the ground that Harris's alleged constitutional right was not "clearly established." Its contrary judgment should be reversed.

CONCLUSION

The Court should abandon the strict "order of battle" imposed by *Saucier*, and judgment of the court of appeals should be reversed.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN*
Solicitor General
MICHAEL SCODRO
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

DECEMBER 2006

TRCY KING
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130

CRAIG J. TILLERY
Acting Attorney General of
Alaska
P.O. Box 110300
Juneau, AK 99811

TERRY GODDARD
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007

MIKE BEEBE
Attorney General of Arkansas
323 Center Street
Little Rock, AR 72201

BILL LOCKYER
Attorney General of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street, 5th Floor
Denver, CO 80203

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334-1300

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-0010

STEVE CARTER
Attorney General of Indiana
IGCS – Fifth Floor
302 West Washington Street
Indianapolis, IN 46204

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

MICHAEL A. COX
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

JIM HOOD
Attorney General of Mississippi
Department of Justice
P.O. Box 220
Jackson, MS 39205

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401

KELLY A. AYOTTE
Attorney General of New Hampshire
33 Capitol Street
Concord, NH 03301

WAYNE STENEHJEM
Attorney General of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-0040

W.A. DREW EDMONDSON
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-4894

HARDY MYERS
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

THOMAS W. CORBETT, JR.
Attorney General of
Pennsy[illegible]
16th Floor, [illegible]awberry Square
Harrisburg, PA 17120

ROBERTO J. SÁNCHEZ-RAMOS
Secretary of Justice of Puerto Rico
P.O. Box 9020192
San Juan, PR 00902-0192

PATRICK LYNCH
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

HENRY MCMASTER
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549

ROBERT E. COOPER, JR.
Attorney General of Tennessee
P.O. Box 20207
Nashville, TN 37202

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

ROBERT F. MCDONNELL
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

PATRICK J. CRANK
Attorney General of Wyoming
123 State Capitol
Cheyenne, WY 82002

(4)

No. 05-1631

IN THE

Supreme Court of the United States

TIMOTHY SCOTT, DEPUTY SHERIFF,
COWETA COUNTY, GEORGIA,
Petitioner,

v.

VICTOR HARRIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

CHARLES A. ROTHFELD
ANDREW J. PINCUS
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

DAN KAHAN
YALE LAW SCHOOL
SUPREME COURT ADVOCACY CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-4800

RICHARD RUDA*
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Amici will address the following question:

Whether the decision of a police officer to effect the arrest of a fleeing motorist through a high-speed chase is reasonable under the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] They have a compelling interest in the issue presented in this case: the standard under which a law enforcement official who engages in a vehicular pursuit resulting in injury to the fleeing suspect may be held liable under the Fourth Amendment.

This case concerns an essential and longstanding tool for enforcing and maintaining respect for the rule of law. In today's highly mobile society, vehicular pursuits are vital to law enforcement's ability to apprehend suspects, conduct investigatory stops, and enforce important traffic and safety laws. The Court's decision regarding the extent to which such pursuits are subject to constitutional scrutiny under the Fourth Amendment will directly affect *amici* and their members: it will have an impact not only on the everyday decisions of law enforcement authorities across the country in conducting vehicular pursuits, but also on the ways in which state and local governments regulate police practices. *Amici* therefore submit this brief to assist the Court in the resolution of this case.

STATEMENT

While patrolling a highway at night in Coweta County, Georgia, Sheriff's Deputy Clinton Reynolds observed a car traveling 73 mph in a 55 mph zone. Pet. App. 2a. To alert the driver of his speed, Deputy Reynolds began to follow, flashing his cruiser's blue lights. In response, the speeding car

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

accelerated and headed toward the populated area of Peachtree City. *Id.* at 2a-3a, 31a.

Deputy Reynolds caught up to the driver and turned on his siren.[2] The vehicle continued to flee, traveling well in excess of the speed limit. The driver crossed the double-yellow line and passed cars on the wrong side of the road, breaking several traffic laws. Pet. App. 2a, 31a. Approaching a red light, the driver continued through the intersection, driving around vehicles waiting for the light to change. Deputy Reynolds alerted his dispatch that he was pursuing a fleeing suspect. *Ibid.*

Petitioner Timothy Scott overheard Reynolds' radio report and, in a position to assist, joined in the pursuit. As the fleeing car entered Peachtree City, it swerved into a drugstore parking lot. Two Peachtree City police cruisers were already in the lot, and together with Deputy Reynolds they attempted to box in the suspect's car. Deputy Scott proceeded around the parking lot to cut off the suspect's exit. Pet App. 3a, 32a.

Though accounts differ slightly as to what happened next, what is clear is that the fleeing suspect, encircled by three police cars, exited the parking lot. When Deputy Scott attempted to use his car to block the suspect's escape, the suspect collided with Deputy Scott's car. Pet. App. 32a. The suspect managed to get back onto the highway and once again fled at a high speed. *Ibid.*

Because he feared that the suspect posed an increasing danger to the public (Pet. 5), Deputy Scott, now the lead car in the chase, radioed for permission to perform a "PIT" (Precision Intervention Technique) maneuver. A PIT maneuver is "a driving technique designed to stop a fleeing motorist

[2] Turning on the siren activated a video camera mounted in Deputy Reynolds' car, which recorded the ensuing chase. Though the court below emphasized factual disputes between the parties, in reality these disputes are slight, because the police video camera captured vivid evidence of the events surrounding this suit.

safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." Pet. App. 3a. Deputy Scott's request was in accordance with his department's policies on high-speed pursuits, which provided that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." *Id.* at 23a n.2 (quoting Coweta County Sheriff's Dep. Vehicle Pursuit Policy).

After receiving permission from his supervisor to employ a PIT maneuver (Pet. App. 4a) and ascertaining that no other motorists appeared to be in the area (Pet. 5-6; see also Pet. App. 11a), Deputy Scott decided to end the chase, which had now stretched over nine miles. *Id.* at 2a. Due to the suspect's high rate of speed, Deputy Scott was unable to perform a PIT, but he did manage to make contact with the suspect's rear bumper. This caused the suspect to lose control of his vehicle, which left the roadway and crashed. The suspect – respondent Victor Harris – was not wearing his seatbelt (Pet. 6) and, though he survived the crash, he was rendered a quadriplegic. Pet. App. 4a.

INTRODUCTION & SUMMARY OF ARGUMENT

The use of deadly force to end high-speed chases is very different from the typical use of deadly force to effect an arrest. The type of arrest at issue in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the principal authority relied upon by the Eleventh Circuit, involved the concentrated use of force against a single individual. A high-speed car chase over public highways, in contrast, has a much broader impact: whenever police resort to this technique to effectuate a seizure, they are necessarily creating risks not just for fleeing suspects, but for members of the general public as well.

The generalized impact of this policing technique creates distinctive practical and political considerations that must be taken into account under the Fourth Amendment. One is the

unique and complex balancing determinations officers must make when they decide whether to effectuate a seizure by these means. The fact-sensitivity of such determinations defies any clear set of judicially administrable standards such as those that regulate the use of a firearm to subdue a fleeing felon. Another is the unique stake the public itself has in assuring that officers make this determination in a reasonable way. In particular, because the public itself is placed at risk by high-speed chases, there are strong *political checks* against the use of this tactic absent a manifest gain to public safety that outweighs the lethal risks involved. This factor, too, is completely lacking in the sort of seizure exemplified by *Garner*, and reinforces the conclusion that close judicial oversight is unnecessary to assure that high-speed car seizures will be conducted in a reasonable fashion.

I. Policing techniques that affect the privacy or liberty of members of the public generally are presumptively reasonable under the Fourth Amendment. The Fourth Amendment prohibits searches and seizures that "unreasonably" subordinate the liberty or privacy of individuals to the state's interest in public safety. Where, as in *Garner*, police use concentrated force against a single individual, the public faces little risk to its own liberty and privacy. As a result, political assent and oversight are unreliable means of assuring that such seizures will be carried out in a way that strikes a reasonable balance between liberty and order. But where a police search or seizure technique *does* impinge significantly on the privacy or liberty of the public, the approval of democratically accountable actors *is* strong evidence that the technique in question is reasonable. Recent decisions upholding the constitutionality of law-enforcement checkpoints, sobriety checkpoints, and drug testing of students for sports and other extracurricular activities, have done so in large part on this ground.

II. High-speed chases – and seizures affected through them – have a generalized impact on the public, and are

therefore presumptively reasonable. A high-speed chase presents obvious and inescapable risks, not just to suspects but to members of the public. Not surprisingly, members of the public and their democratically accountable representatives have taken an active interest in assuring that this technique for effecting seizures is used *only* when the benefits it contributes to public order outweigh its risks. Indeed, more than 90 per cent of police and sheriff's departments have created polices to govern how officers should initiate, conduct, and terminate high-speed chases. Such policies evince the reality and effectiveness of political checks on seizures affected through high-speed chases.

III. Because Deputy Scott responded reasonably to a serious threat to public safety, he did not violate the Fourth Amendment. The purpose of and the method used to execute this seizure fell well within the zone of reasonableness. First, law enforcement officers have a clear right to pursue a suspect who recklessly flees by car. Second, high-speed pursuits are often useful for enforcing criminal laws and traffic safety. And once a chase begins, it is extremely dangerous and typically ends in a matter of minutes.

Deputy Scott had to make a split-second decision about how to neutralize a serious threat to public safety. He initiated the seizure of respondent only after ascertaining that no other motorists appeared to be in the immediate area, thus minimizing risk of harm to the public, though at considerable risk to himself. This Court should avoid second-guessing his decision, made with the permission of his supervisor and pursuant to the local policy, to end the pursuit by making contact with the fleeing suspect's vehicle.

ARGUMENT

I. POLICING TECHNIQUES THAT HAVE A GENERALIZED IMPACT ON THE PUBLIC ARE PRESUMPTIVELY REASONABLE UNDER THE FOURTH AMENDMENT.

The Fourth Amendment protects persons from "unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he standard of reasonableness governing any specific class" of such activities, this Court has recognized, requires a "balanc[ing]" of the affected person's "privacy and personal security" and government's interest in securing "public order." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985).

Although "'not capable of precise definition or mechanical application'" (*Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979))), this balancing inquiry is appropriately sensitive to one factor of particular relevance here: namely, the *generality* of a policing technique's impact on the public at large. The more diffusely felt the impact of a policing technique is within a community, the more reason there is to view approval of that technique in the normal democratic political process as evidence that the imposition it imposes on liberty and privacy is indeed commensurate with the contribution it makes to public order. See, *e.g.*, *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004) (noting that "community hostility to related traffic tieups" will assure that police use generalized motorist checkpoints only when reasonable for apprehension of fleeing hit-and-run motorists); *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (citing approval in "democratic, participatory process" as evidence of reasonableness of school drug-testing policy applied generally to those involved in extracurricular activities).

Consistent with this principle, this Court has singled out for greatest judicial scrutiny those policing techniques that concentrate their coercive incidence on discrete individuals.

Because the interests of individual criminal suspects is usually a matter of indifference to the general public, it is unrealistic to expect "prosecutors and policemen * * * to maintain the requisite neutrality" in determining whether the invasion of privacy associated with a search of such a person's residence is justified by the state's need for evidence of crime. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450 (1971). Accordingly, before they may search the residence of an individual suspected of a crime, law enforcement authorities must obtain a warrant by demonstrating probable cause to a magistrate. See *ibid*; see also John Hart Ely, Democracy and Distrust 96-97 (1980).

Members of the public are also likely to be insufficiently invested in – indeed, potentially even hostile to – the interests of individual criminal suspects who are seized through the use of *concentrated* deadly force. Accordingly, the constitutionality of the use of a firearm to subdue a fleeing suspect must comply with judicially enforced constitutional standards. See *Garner*, 471 U.S. at 11-12.[3]

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[3] *Garner*, the decision principally relied upon by the Eleventh Circuit in its decision below, occupies one end of the spectrum of Fourth Amendment reasonableness. In holding that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead" (471 U.S. at 11), the Court found that all of the considerations bearing on reasonableness pointed one way. Obviously, the private interest is at its height in such a case, where a state actor applies force to the suspect with the intent to injure or kill. But the Court found that the other relevant factors also weighted the balance against finding such a shooting to be reasonable. The public interest in effecting an immediate seizure is relatively low "[w]here the suspect poses no immediate threat to the officer and no threat to others." *Ibid.* And objective indicia of societal attitudes toward the law enforcement conduct at issue in *Garner*, which provide some basis for assessing the reasonableness of the seizure, led to the same conclusion: the Court surveyed "the prevailing rules in individual jurisdictions" (*id.* at 15-16) and found that "a

In contrast, where policing techniques do meaningfully impinge on members of the public, this Court has generally viewed the need for judicially enforceable standards as unnecessary. In those circumstances, the incentive democratically accountable political actors have to avoid imposing resented burdens on their constituents operates as an assurance that the use of the technique, subject to whatever limits are placed on it by political actors themselves, strikes a reasonable balance between liberty and order.

In *Lidster*, for example, the Court upheld a police checkpoint set up to investigate a hit and run accident. The Court noted that no "rule is needed" to assure that such stops are "reasonable, [and] hence, constitutional" because "practical considerations – namely, limited police resources and community hostility to related traffic tieups[,]" can be expected to constrain the unwarranted use of this technique. 540 U.S. at 421, 426.

Likewise, law-enforcement officials need not obtain a warrant or even have probable cause to stop motorists at sobriety checkpoints (see *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1980)), or to search all persons entering airports (see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 675 n. 3 (1989) (collecting cases)). Insofar as these policies impinge on the liberty and privacy of members of the public at large, there is far less reason for courts to doubt the determination of democratically accountable officials that such policies strike a fair balance between liberty and order. See generally Silas Wasserstrom & Louis

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majority of the police departments in this country have forbidden the use of deadly force against nonviolent suspects." *Id.* at 10-11. See *id.* at 16-19. Accordingly, nothing before the Court in *Garner* provided any assurance either that shooting a nondangerous suspect is reasonable or that, in situations where police confront nondangerous suspects, constraints exist to check unreasonable law enforcement behavior.

Seidman, *The Fourth Amendment As Constitutional Theory*, 77 Geo. L.J. 19, 95-96 (1988); Dan M. Kahan & Tracey Meares, *The Coming Crisis in Criminal Procedure*, 86 Geo. L.J. 1153, 1173-74 (1998).

When a law-enforcement policy affects a person other than the average citizen, political assent remains evidence of the policy's presumptive reasonableness if there is a strong alignment of interests between that person and members of the public at large. In *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 650 (1995), for example, the Court upheld a drug testing policy for student athletes, in part because the students' parents, who can be presumed to value the privacy of their children, "gave their unanimous approval" to the policy in a public meeting. Likewise, deliberations in a "democratic, participatory process" also "revealed little, if any, objection" (536 U.S. at 841 (Breyer, J., concurring)) to the school drug-testing recently policy upheld in *Earls*. The "administrative search" doctrine, which treats warrantless searches of regulated commercial enterprises (see, *e.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987)), may be justified on the analogous ground that members of the public as consumers will resist unreasonable intrusions into the operations of such businesses. See William Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1044-45 (1995).

To be sure, the generalized impact of a policing technique does not render it immune from Fourth Amendment scrutiny. At a minimum, however, it is a factor that militates strongly in favor of finding such acts to be reasonable.

II. HIGH-SPEED SEIZURES HAVE A GENERALIZED IMPACT ON THE PUBLIC AND ARE THUS PRESUMPTIVELY REASONABLE.

The source of the Eleventh Circuit's error in this case was its determination that a seizure effected through a high-speed chase raises the same types of considerations as the

deadly-force seizure at issue *Garner*. *Garner* arose in a context where many members of the public would have been personally unaffected by the interests of the individual suspect against whom deadly force was used. In sharp contrast, the conduct and termination of a high-speed chase presents inherent risks that are widely felt by the community; while most people surely do not envision being chased from someone else's yard by an armed patrolman (as was the suspect in *Garner*), many people can imagine being threatened by an unreasonably dangerous high-speed pursuit conducted on public roads. As one might expect, members of the public and their democratically accountable representatives have manifested an intense interest in assuring that this means of affecting an arrest is carried out *only* in circumstances where public safety clearly warrants it. Under these circumstances, the seizure at issue in this case should have been afforded the presumption of reasonableness extended to policing techniques that impinge on the liberty and privacy of members of the public generally.

A. High-Speed Seizures Create Risk Not Just For Suspects, But Also for Members of the Public.

The inherent dangerousness of the conduct and termination of high-speed chases means that this is a police practice that affects the public generally. There frequently are compelling reasons to initiate a high-speed chase, and there is no Fourth Amendment limit on the decision by law enforcement authorities to begin and continue a pursuit.[4] But there is no denying that the risk posed to the public by high-speed pursuits is also considerable.

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[4] The Court has made clear that "a police pursuit in attempting to seize a person does not amount to a seizure within the meaning of the Fourth Amendment." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 843 (1998) (citing *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991)).

1. The ability to chase fleeing suspects is an essential aspect of effective law enforcement. As the Court has noted, "[h]eadlong flight – wherever it occurs – is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000). Studies, including one by respondent's expert witness, suggest that some 35 to 40 per cent of high-speed chases are initiated to apprehend felons. Geoffrey P. Alpert, Nat'l Inst. Of Justice, U.S. Dept. Of Justice, *Police Pursuit: Policies and Training* 3 (1997). More often than not, these pursuits are successful; in Metro-Dade, Florida, for example, 75 per cent of high-speed chases led to apprehension of the suspect. *Ibid.* And traffic violations may themselves be very dangerous offenses that pose a grave threat to public safety. See National Highway Transportation Safety Administration, *Traffic Safety Facts 2004 Data: Speeding* 1. In 2004, speeding contributed to 30 per cent of all fatal crashes, resulting in 13,192 lives lost. *Id.* That same year, there were an estimated 591,556 injuries in accidents where speeding was a contributing factor.[5]

Moreover, speeding often is associated with alcohol or drug abuse, which is itself a very significant cause of traffic fatalities and injuries. See National Highway Transportation Safety Administration, *Traffic Safety Facts 2004 Data: Speeding* 3. See *Sitz*, 496 U.S. at 451 (noting that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it"); *id.* at 455 (Blackmun, J., concurring in the judgment) ("agree[ing] with the Court's lamentations about the slaughter on our highways and about the dangers posed to almost everyone by the driver who is under the influence of alcohol or other drug[s]").

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[5] These data are available on request from the National Highway Traffic Safety Administration's National Center for Statistics and Analysis, http://www-fars.nhtsa.dot.gov/datarequests.cfm?Stateid=0&yea r=2005.

Considering that speeding and drunk driving together cause tens of thousands of deaths each year (see National Highway Transportation Safety Administration, *Traffic Safety Facts 2004 Data: Speeding* 1, *Alcohol* 1), an individual like respondent who demonstrates impaired judgment by speeding recklessly away from a law enforcement officer poses a clear and immediate danger to other drivers and pedestrians. In fact, this Court in *Garner* specifically referenced vehicle safety to show that some misdemeanants pose a greater risk to the public than do felons. *Garner*, 471 U.S. at 14.

2. Whenever automobiles travel at high speeds there is a danger of an accident, however, and that is no less true of police pursuits. Such pursuits do, unfortunately, lead to fatalities.[6] And in some instances these accidents cause injury to bystanders or drivers of other vehicles.[7]

High-speed chases accordingly pose a substantial risk to the public that is, in significant respects, similar in kind to that faced by the fleeing suspect and the pursuing officer. Simply put, both the public and the suspect want officers to refrain from engaging in unreasonably dangerous high-speed chases and seizures that result in either driver losing control and terminate in an accident and injury.

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[6] From 2000 to 2005, there were an annual average of 362 pursuit-related fatalities. These data are available on request from the National Highway Traffic Safety Administration's National Center for Statistics and Analysis, http://www-fars.nhtsa.dot.gov/data_requests.cfm?stateid=0&year=2005.

[7] See National Highway Traffic Safety Administration National Center for Statistics and Analysis, http://www-fars.nhtsa.dot.gov/data_requests.cfm?stateid=0&year=2005; National Highway Traffic Safety Administration, *Travel Safety Facts 2004*, at 94. See also *Jones v. Chieffo*, 833 F. Supp. 498, 509 (E.D. Pa. 1993); Seth Mydans, *Alarmed by Deaths in Car Chases, Police Curb High-Speed Pursuits*, *New York Times*, Dec. 26, 1992, at 1.

B. The Political Process Imposes Significant Checks On High-Speed Seizures.

As might be expected, the visibility of high-speed pursuits and their effect on members of the public have generated significant political scrutiny of the practice. High-speed pursuits on public roads create a spectacle, and the media has eagerly covered these dramatic events.[8] As a result, the public understands the dangers involved in high-speed chases, and communities have engaged politically on the question of when to employ this seizure technique.

Surveying only the last ninety days of American newspapers, numerous articles demonstrate the political salience of high-speed pursuits. Communities across the country are debating when the police should engage in such chases. In Noble, Oklahoma; Kansas City, Missouri; and Burlington, North Carolina, for example, city councils have heard public complaints about recent high-speed pursuits, and the cities have acted to investigate police procedures.[9] Editorials on both sides of the issue have appeared in local newspapers in

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[8] Reporting on high-speed pursuits has become a fixture of local news broadcasts, and an entire television show has been created to air footage of police pursuits. See Theodore O. Prosise & Ann Johnson, *Law Enforcement and Crime on* Cops *and* World's Wildest Police Videos*: Anecdotal Form and the Justification of Racial Profiling*, 68 Western J. Comm. 72, 74 (2004) (discussing "World's Wildest Police Videos," a television show that in its first year earned the second highest Neilson ratings in its timeslot).

[9] *See* Jennifer Griswold, *Wreck Puts Pursuit Policy in Review*, The Oklahoman (Oklahoma City), Oct. 18, 2006, at 4D; Robert Boyer, *Crash Victim's Sister Calls for Chase Policy Changes*, Times-News (Burlington, N.C.), Oct. 18, 2006; Bill Graham & Glenn E. Rice, *Loss of 4 Leaves Grief, Shock; As Friends and Family Recall Wreck Victims, Some Have Questions About the Police Chase*, Kansas City Star, Sept. 22, 2006.

Richmond, Virginia, and St. Petersburg, Florida.[10] And the police departments themselves are convening boards to review their procedures after well-publicized pursuits in Phoenix, Arizona; Lakeland, Florida; and Ada County, Idaho.[11]

Police departments in nearly every city in the country have reacted to public concern by instituting "pursuit policies" to govern when officers may effect seizures through high-speed pursuits. U.S. Department of Justice data show that in 2003, 94 per cent of all local police departments – and almost 100 per cent of departments serving populations greater than 10,000 – had a written policy on pursuit driving. See Matthew J. Hickman & Brian A. Reaves, Bureau of Justice Statistics, U.S. Dept. of Justice, *Local Police Departments, 2003*, at 24 (2006). Data for local sheriffs' departments are similar: in 2003, 95 per cent of sheriffs' departments had written pursuit policies. See Matthew J. Hickman & Brian A. Reaves, Bureau of Justice Statistics, U.S. Dept. of Justice, *Sheriffs' Offices, 2003*, at 24 (2006).

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[10] *Compare* A. Burton Hinkle, Editorial, *Fewer Chases Could Save Lives, Including Officers'*, Richmond Times Dispatch, Sept. 8, 2006, at A-11 (arguing that while "more than 300 people a year are killed in America during high-speed police chases," the "average annual number of serial killers caught in high-speed chases is zero"), *with* Dan Spice, Editorial, *Deluge of Car Thefts Is Unforgivable*, St. Petersburg Times (Florida), Sept. 24, 2006 (arguing that a local policy geared toward reducing high-speed chases encourages crime, since "[t]he message is clear: It's a free ride in St. Petersburg for crime").

[11] *See* Judi Villa, *New Pursuit Policy Reduces Phoenix Police Car Chases*, Arizona Republic (Phoenix), Sept. 20, 2006, at 1; Dave Nicholson, *Review Finds Lakeland Police Followed Policy in Fatal Chase*, Tampa Tribune, Oct. 7, 2006, at 4; Patrick Orr, *Ada County Police Agencies Agree on Plan for Hot Pursuits; Policy Aims To Minimize Danger by Clarifying Who's in Charge and Limiting the Number of Patrol Cars*, Idaho Statesman (Boise), Oct. 7, 2006, at 1.

The trend, furthermore, is to respond to the public's concerns by enacting more restrictive policies. A 1997 study found that, in a representative sample of police departments nationwide, nearly half of all departments with pursuit policies had updated their policy in the last two years. Dennis Jay Kenney & Geoffrey P. Alpert, *A National Survey of Pursuits and the Use of Police Force: Data from Law Enforcement Agencies*, 25 J. Crim. Just. 315, 318 (1997). Of those departments, 87 per cent had changed their policy to further restrict the use of high-speed pursuits. *Ibid.* Currently, 61 per cent of all local police departments – and over 80 per cent of departments serving populations greater than 10,000 – have "restrictive" policies that limit "pursuits according to specific criteria such as type of offense or maximum speed." Hickman, *Local Police Departments, 2003*, *supra*, at 24.

These changes to pursuit policies have changed police practice. In Metro-Dade, Florida, for example, officials made the department's pursuit policy more restrictive. The year before the policy was changed, officers engaged in 279 pursuits. The year after the change, that number dropped to 51. Alpert, *Police Pursuit: Policies and Training*, *supra*, at 4. In Omaha, Nebraska, by contrast, after the police pursuit policy was changed to be more *permissive*, the number of annual high-speed pursuits jumped from 17 to 122. *Ibid.* These numbers also suggest the importance of allowing sufficient flexibility to local authorities, who are best able to establish rules that take account of local variations and conditions: a restrictive pursuit policy that strikes the proper balance for a large metropolitan region may not be effective or strike the right balance in a smaller urban area.

In sum, precisely because arrests effected by high-speed chases put members of the public and not just individual suspects at risk, they have generated intense and effective political oversight. Under these circumstances, there is every reason to think the police will use this technique *only* when the contribution it makes to "public order" outweighs the impact

it has on "privacy and personal security" (*T.L.O.*, 469 U.S. at 337).

C. The Impact Of High-Speed Seizures On The Public Is At Least As Generalized As That Of Other General-Impact Policing Techniques Held Reasonable By This Court.

As discussed above, this Court has frequently concluded that the generalized impact of and associated political checks upon the use of a policing technique render judicially enforceable limitations on that technique unnecessary to assure its reasonable exercise. Those considerations are even more forcefully presented in this case. Whereas the Court expected the mere inconvenience of "traffic tieups" (540 U.S. at 426) to motivate public oversight in *Lidster*, for example, here it is the prospect of serious injury or even death on the highway that can be expected to generate – indeed, has generated – intense public scrutiny.

The fact that the intended target of the police force in this case is the fleeing suspect and not members of the public does not change this conclusion. As we have noted, this Court has frequently treated political assent as furnishing evidence (and ongoing assurance) of reasonableness when policing techniques affect third parties whose interests are closely aligned with those of the public. See *Earls*, 536 U.S. 822 (school children); *Vernonia School Dist. 47J*, 515 U.S. 646 (same); *Burger*, 482 U.S. 691 (regulated businesses). The alignment of the public's interest and the targeted party's interest is at least as close in the high-speed chase setting as it was in any of these other settings, and involves stakes – including death for ordinary citizens – that are in fact much graver.

For these reasons, identifying the circumstances under which the police should chase and seize fleeing suspects is a question that has in fact engendered intense debate across the country. "When trying to resolve this kind of close question

involving the interpretation of constitutional values," the Court should take into account the fact that members of the public who may be affected have had "the opportunity to be able to participate" in the reasonableness calculus. *Earls*, 536 U.S. at 841 (Breyer, J., concurring). In fact, nearly all localities have instituted and are continually updating pursuit policies. Therefore, as the *Sitz* Court recognized with respect to sobriety checkpoints, courts should be sensitive to the role of politically accountable officials in deciding which "among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." 496 U.S. at 453. When a general-impact seizure, such as a seizure effected through a high-speed chase, galvanizes the political process, the actions of politically accountable officials within this context bear the mark of reasonableness.

III. DEPUTY SCOTT RESPONDED REASONABLY TO A SERIOUS THREAT TO PUBLIC SAFETY.

Against this background, Deputy Scott did not violate the Fourth Amendment. His use of force in this case struck a reasonable balance between respondent's Fourth Amendment interests and the government's concern with public safety.

1. First, for the reasons we have suggested, the generality of the public concern with high speed chases means that the Court should approach this case with a thumb on the reasonableness side of the Fourth Amendment scale. The political process has been actively engaged in drawing lines defining acceptable police behavior in this context. That does not altogether insulate high-speed seizures from review, but it does indicate that police conduct has been shaped by a public that might be affected by those police activities, and whose judgments about reasonableness accordingly are due substantial deference. When a case arises in this setting, those challenging the seizure accordingly must make an extraordinary showing to establish that it fell outside the zone of constitutional reasonableness. Respondent cannot do so here.

2. In calculating the Fourth Amendment balance, this is a case in which "[t]he relevant public concern was grave." *Lidster*, 540 U.S. at 427. As a general matter, the Court has emphasized that public safety weighs heavily on the governmental side of the constitutional equation. See, *e.g.*, *Samson* v. *California*, 126 S. Ct. 2193, 2201 (2006); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *United States* v. *Hensley*, 469 U.S. 221, 229 (1985); *South Dakota* v. *Opperman*, 428 U.S. 364, 369 (1976). For this reason, even the most intrusive seizure may be reasonable when the suspect "poses a threat of serious physical harm, either to the officer or others." *Garner*, 471 U.S. at 11. See *id.* at 27 (O'Connor, J., dissenting).

That is the case here. Though high-speed pursuits are dangerous, we explain above that they often serve compelling governmental interests in criminal law enforcement and traffic safety. Considerations like these have made the Court especially deferential to official attempts to make the roads safe. See, *e.g.*, *Sitz*, 496 U.S. at 451 (quoting *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957)) (upholding sobriety checkpoints because of their effect on the "increasing slaughter on our highways" caused by drunk driving); *Delaware* v. *Prouse*, 440 U.S. 648, 663 n.26 (1979) (suggesting that mandatory safety inspections at truck weigh-stations are reasonable). The "nature and immediacy" of the concern that supported the seizure in this case therefore is apparent. *Vernonia School Dist. 47J*, 515 U.S. at 660. See Pet. 6 ("Harris and his own expert agree that his driving was reckless and a danger to the public") (citing R. 38, Harris Depo., at 127, 129, 138; R. 37, Alpert Depo., at 68-69, 71-72, 74-85).

3. In addition – and particularly when viewed against the background of significant public and political involvement in drawing up the rules governing high-speed chases – this case plainly is one where "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances

that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397. *Cf. Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment").

In fact, the imperative to bring a high-speed chase to the quickest possible end is obvious. Precisely because such pursuits are so dangerous, police officers who lawfully initiate a chase must act quickly to terminate it. Chases do not have to continue for long before ending badly; 50 per cent of all pursuit collisions occur in a pursuit's first two minutes, and more than 70 per cent of all collisions occur before the sixth minute. Jeremy Travis, Nat'l Inst. of Justice, U.S. Dept. of Justice, *Pursuit Management Task Force* 2 (1998). Furthermore, at high speeds it is unlikely that officers will be able to prevent harm to innocent bystanders once the risk has become immediate. Given the high rate at which reckless evasion of law enforcement officers injures bystanders and the speed with which chases evolve, it is reasonable for officers to take advantage of any opportunity to end high-speed chases, rather than to wait for the threat to become imminent.

The Court addressed these considerations in rejecting the claim that injury resulting from a high-speed chase violated the Due Process Clause:

> [T]he police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." * * * A police officer deciding whether to give chase must balance on the one hand the need to stop a suspect and show that flight from the law is

> no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.

County of Sacramento v. *Lewis*, 523 U.S. 833, 853 (1998) (citation omitted). The difficulty of that decision is, if anything, greatly compounded once a chase has commenced and a police officer must decide how it should be terminated.

4. Against this background, the method used by Deputy Scott to terminate the chase in this case was well within the reasonable range of options. Consider the circumstances that he faced on the evening of the chase here. The suspect, who was speeding to begin with, accelerated to escape from police officers, crossed the double-yellow line and passed cars on the wrong side of the road, and ignored two red lights, Pet. App. 2a, racing headlong through intersections. Understanding the threat that the suspect posed to other motorists, Deputy Scott first attempted to bring respondent to a stop in the drugstore parking lot, where their cars were traveling at low speeds. By blocking the parking lot's exit, Deputy Scott tried to end the chase in a manner that, while placing himself at risk, posed a risk of physical injury to the suspect that was low.

It was only after respondent collided with Deputy Scott's car and sped off that Deputy Scott took more severe action. Even then, he acted deliberately, radioing for permission to make car-to-car contact before executing the bumping maneuver. He carefully selected his moment to act, moreover, making contact with the suspect's car only at a time when no other vehicles were in the vicinity.

These actions were reasonable in every respect, setting this case apart from those involving applications of deadly force that violate the Fourth Amendment. *First*, Deputy Scott reacted appropriately to the threat posed by the suspect. The shooting in *Garner* failed Fourth Amendment scrutiny be-

cause the unarmed suspect's flight posed "no immediate threat to the officer and no threat to others." 471 U.S. at 11. In this case, by contrast, Deputy Scott had ample reason to believe that the suspect's flight was extremely dangerous. Not only did the suspect demonstrate that he was a "threat to the officer" by colliding with Deputy Scott's police cruiser, his reckless driving clearly evinced a "threat to others."

Second, the purpose of the seizure in this case enhances its reasonableness. The officer in *Garner* shot simply to prevent the escape of a nondangerous suspect. See *Garner*, 471 U.S. at 3 n.3 (stating that the officer shot the suspect because the officer "could not have gotten over the fence easily" and "Garner, being younger and more energetic, could have outrun him"). But in this case, preventing escape and apprehending a nondangerous suspect to face subsequent judicial proceedings was not Deputy Scott's primary motivation; the suspect was not about to get away from Deputy Scott and his fellow officers, who stayed with the suspect through his many attempts to evade them. Instead, and unlike in *Garner*, this seizure was aimed not at preventing escape, but at ending the suspect's increasing threat to public safety. While of course "[i]t is not better that all * * * suspects die than that they escape" (*id.* at 11), when suspects place the lives of others at risk, officers like Deputy Scott may reasonably apply deadly force to end the danger to the public. See *ibid.* (allowing deadly force where "the suspect poses a threat of serious physical harm").

Third, Deputy Scott's actions before the seizure confirm that his application of deadly force was warranted. See *Garner*, 471 U.S. at 9 (stating that a seizure must be judged according to the "totality of the circumstances"). The officer in *Garner* shot the suspect immediately, without first attempting a less dangerous seizure technique or giving the suspect more than a fleeting chance to surrender. See *id.* at 3-4. Deputy Scott, on the other hand, first tried a substantially less dangerous approach: he attempted to stop respondent's car at

low speeds while it was leaving the drugstore parking lot. And Deputy Scott gave the suspect ample opportunity to surrender, as he and his fellow officers chased the suspect for nine miles with lights and sirens blazing. See *id.* at 11-12 (allowing deadly force where the suspect poses a threat and, "where feasible, some warning has been given").

Fourth, Deputy Scott's conduct complied with his community's judgments about when vehicle pursuits and the use of deadly force are reasonable. According to the vehicle pursuit policy of the Coweta County Sheriff's Department ("CCSD"), each deputy has the discretion to decide when to initiate, continue, and terminate a high-speed pursuit. Pet. App. 33a. In addition, "[d]eliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." *Id.* at 34a. It is undisputed here that Deputy Scott received permission over the radio to employ the PIT method. Traveling at high speeds, Deputy Scott managed to end the chase by making contact with the suspect's rear bumper.

Furthermore, CCSD's use of force policy permits deadly force "when the Deputy reasonably believes it is necessary * * * to prevent grave bodily injury to themselves [*sic*] or another, and all other available means of defense have failed or would be inadequate or dangerous," or "when necessary to prevent the commission of * * * any felony which involves the use or threat of physical force or violence against any person." Pet. App. 21a. In this case, the pursuing officers failed to stop respondent in the drugstore parking lot and feared that his reckless driving could cause grave bodily injury to individuals in Peachtree City, a densely populated suburb 28 miles from Atlanta.[12] In addition, force may have

[12] The fact that part of this chase occurred in a densely populated suburb makes Deputy Scott's conduct even more reasonable. The chase moved from less densely settled Coweta County (201 persons per square mile) to the much more densely settled Peachtree

been reasonably necessary to prevent the commission of a violent felony. If the fleeing suspect had struck and killed a police officer or bystander, he may have committed "involuntary manslaughter in the commission of an unlawful act," a felony under Georgia law.[13]

Finally, Deputy Scott's actions were reasonable because, even when he used deadly force, he did so in a manner that was designed primarily to disable the suspect's car rather than bring about his injury or death. The seizure technique employed in *Garner* was unequivocally deadly: the suspect was shot in the back of the head. *Garner*, 471 U.S. at 4. Indeed, *Garner*'s holding is most relevant to applications of deadly force involving firearms. See *id.* at 11 ("A police officer may not seize an unarmed, nondangerous suspect by *shooting him dead*.") (emphasis added); *id.* at 31-32 (O'Connor, J., dissenting) ("The Court's opinion, despite its broad language, actually decides only that the shooting of a fleeing burglary suspect who was in fact neither armed nor dangerous can support a § 1983 action.").

City (1373 persons per square mile), see United States Census Bureau, *State and County Quick Facts*, available at http://quickfacts.census.gov/qfd/states/13/13077.html, before ending on a highway south of Peachtree City. See Pet. App. 3a. In defining urbanized areas and urban clusters, the Census Bureau classifies an area as densely settled when it exceeds 1,000 people per square mile. Census 2000 Urban and Rural Classification, available at http://www.census.gov/geo/www/ua/ua_2k.html.

[13] Georgia law recognizes involuntary manslaughter in the commission of an unlawful act whenever one "causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony." Official Code of Georgia Ann. § 16-5-3(a). Involuntary manslaughter in the commission of an unlawful act is punishable by imprisonment for one to ten years.

The use of deadly force in this case, however, was not aimed at killing the suspect. Instead, Deputy Scott's maneuver was intended to halt the suspect's car. To be sure, car-to-car contact at high speeds involves considerable risk, but death or serious injury are not inevitable. Deputy Scott acted not to assure respondent's death, but to assure that the suspect's car would be stopped so that it could no longer endanger other cars or drivers. Whatever the ultimate outcome, this intent diminishes the intrusiveness of the government conduct. *Cf. Lewis*, 523 U.S. at 854 ("purpose to cause harm" greatly compounds seriousness of injury inflicted by government actor and is "needed for due process liability in a pursuit chase").

All of these factors distinguish Deputy Scott from the officer in *Garner* and place his actions squarely within the zone of reasonableness.[14] Deputy Scott was a politically account-

[14] Deputy Scott's actions are far more easily defended than those of other officers in cases where this Court precluded § 1983 liability. For instance, the Court recently held that a suspect who fled in a car could not recover from a police officer who shot the suspect through the car's window after the suspect "'had proven he would do almost anything to avoid capture' and that he posed a major threat to, among others, the officers" pursuing him. *Brosseau* v. *Haugen*, 543 U.S. 194, 200 (2004) (per curiam) (quoting *Cole* v. *Bone*, 993 F.2d 1328 (8th Cir. 1993)) (holding that the officer was entitled to qualified immunity because, apart from whether the officer's actions actually violated the Fourth Amendment, her actions were not a clear violation of established law). Like the officer in *Brosseau*, Deputy Scott faced a fleeing suspect who had proven that he would do anything to escape and that he posed considerable danger to the police and to the public. But in contrast to the officer in *Brosseau*, Deputy Scott first attempted to stop the suspect's car using non-deadly means. Moreover, Deputy Scott's use of deadly force was not designed to injure the suspect; rather than shoot the suspect, Deputy Scott tried to end the pursuit by applying force to the suspect's car. If this Court precluded recovery by the suspect in *Brosseau*, surely the facts of this case merit a similar result.

able officer who was forced to make a split-second decision about how to neutralize a serious threat to public safety. In such circumstances, where a suspect races away from police down a public highway, it is difficult to imagine a clearer example of a situation where "society [is] confronted with * * * immediate, vehicle-bound threat to life and limb," and where the police need the flexibility to respond. *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000) (characterizing the need for sobriety checkpoints in *Sitz*).

Local policies provide for a variety of car-disabling tactics, including roadblocks, tire spikes, and the PIT bump method. Barring the most exceptional circumstances, courts should avoid mandating the use of any specific tactic in a particular case. The safety and efficacy of a given tactic varies widely according to the situation, and this Court previously has objected to searching inquiries into which "among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. "Experts on police science might disagree over which of several methods" of terminating a pursuit "is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the government officials who have a unique understanding of, and a responsibility for, limited public resources." *Id.* at 453-54. This Court accordingly should not second-guess Deputy Scott's decision, made with permission and pursuant to Sheriff's Department policy, to end the pursuit by making contact with respondent's vehicle.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES A. ROTHFELD
ANDREW J. PINCUS
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

DAN KAHAN
YALE LAW SCHOOL
SUPREME COURT ADVOCACY CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-4800

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

TIMOTHY SCOTT,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, N.W.
Washington, D.C. 20006

JONATHAN D. HACKER
(*Counsel of Record*)
NICOLE A. SAHARSKY
SUSAN M. MOSS*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Idaho only*

Attorneys for Amicus Curiae

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of respondent.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including the protection of Fourth Amendment liberties. NACDL has frequently filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in safeguarding the individual liberties guaranteed by the Fourth Amendment. *See, e.g.*, *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006); *Kyllo v. United States*, 533 U.S. 27 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Bond v. United States*, 529 U.S. 334 (2000).

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

NACDL is filing in this case to respond in particular to the brief filed by the Solicitor General. For the reasons explained below, NACDL submits that the Solicitor General's brief misapprehends applicable precedents and misstates the facts of this case.

STATEMENT

This case concerns the decision of a sheriff's deputy to apprehend a teenager fleeing a traffic stop for speeding by engaging in a high-speed chase and slamming his car into the back of the teenager's car while the two were traveling at between 70 and 90 miles per hour, causing the teenager's car to flip and rendering him a quadriplegic. The entire chase covered about nine miles and lasted six minutes in total. Pet. App. 2a. Viewed in the light most favorable to Harris, as must be the case on summary judgment, the operative facts are as follows:

1. On March 29, 2001, at 10:42 in the evening, sheriff's deputy Clinton Reynolds observed respondent Victor Harris, then a teenager, speeding on a state highway in Coweta County, Georgia. Pet. App. 2a, 31a; *see also* R.45, Ex. A. Harris was driving at a speed of 73 miles per hour in a 55-mile-per-hour zone, in a car that was registered in his own name and correct address. Pet. App. 2a. Deputy Reynolds flashed his blue lights, but Harris did not slow down or stop. *Id.* Harris did not stop "because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car." *Id.* at 31a.

Reynolds then decided to initiate a high-speed pursuit of Harris. Pet. App. 2a. Reynolds activated his lights, siren, and video camera. *Id.* at 31a. Harris continued driving away, in the direction of the county line and Peachtree City. *Id.* at 3a. He passed vehicles by crossing the double yellow center line and ran one red light. *Id.* at 31a. Harris, however, maintained control of his vehicle and used turn signals

when passing or turning, and no cars were entering the red-light intersection he crossed. *Id.* During the chase, Harris and the officers pursuing him drove at speeds between 70 and 90 miles per hour. *Id.* at 2a.

Reynolds then radioed dispatch to report the pursuit. *Id.* at 31a. Petitioner Timothy Scott, another Coweta County sheriff's deputy, heard Reynolds' announcement and unilaterally decided to abandon his undercover drug assignment and join in the pursuit. Pet. App. 3a, 31a-32a; R.48, at 114-18; *see also* R.36, Ex. A at 22:47:22 ("Let me have him . . . .").

Harris entered Peachtree City, where he slowed down and turned into a parking lot to get to another highway, Highway 74. Pet. App. 3a. Reynolds followed Harris, while Scott positioned himself on the other side of the parking lot to block Harris's exit. *Id.* at 3a, 32a. As Harris approached the exit, Scott drove his squad car directly into Harris's path. *Id.* at 3a.[2] Harris swerved to avoid him but could not, and Scott's car struck Harris's. Pet. App. 3a. The collision did not terminate the pursuit, however; Harris was able to exit the parking lot and enter the highway, with Scott following him closely. *Id.* at 32a. At that point, Peachtree City police department officers began blocking intersections along Highway 74 from cross-traffic. *Id.*

Once Harris and Scott were on Highway 74, Scott radioed his supervisor and asked for authorization to perform a "Precision Intervention Technique" ("PIT") maneuver. Pet. App. 3a. A PIT maneuver is a specialized technique where an officer driving at a safe speed (generally under 35 miles per hour) hits a suspect's car at a particular point in order to

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[2] Scott claims that Harris intentionally hit *his* car, Pet. App. 32a & n.2; *see also* J.A. 21-23, but this factual dispute must be resolved in Harris's favor on summary judgment. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 733 n.1 (2002).

spin and stop the car. *Id.*; *see* National Police Accountability Project ("NPAP") Br. 11-13. A PIT maneuver, if done correctly and under safe conditions, can stop a fleeing motorist quickly and safely, without putting either the suspect or the general public at risk. Pet. App. 3a. Because a PIT maneuver can cause significant injury if done incorrectly, national law enforcement standards generally require that an officer be specifically trained in the maneuver before performing it. *Id.* Scott, however, had never been trained in how to perform a PIT maneuver; he only knew about it from informal conversations around the police station. *Id.* at 3a-4a, 35a; R.49, at 137-41.[3] Nonetheless, Scott's supervisor authorized him to perform the maneuver, saying "Go ahead and take him out. Take him out." Pet. App. 32a-33a.

Scott was still following Harris on the highway, and there were no other motorists or pedestrians in the area. Pet. App. 32a-33a. Even without training in the PIT maneuver, Scott recognized that he could not perform the maneuver because he was going too fast – between 70 and 90 miles per hour. Knowing the PIT maneuver was too dangerous to perform at that speed, Scott chose an unlikely alternative: he simply sped up and "rammed his cruiser directly into" the back of Harris's car. *Id.* at 4a; *see also* at 33a.[4] Harris immediately lost all control of his vehicle, which ran down an embankment, flipped and crashed into a telephone pole, rendering Harris a quadriplegic. Pet. App. 4a.

2. Harris sued Scott and others pursuant to 42 U.S.C. § 1983, primarily alleging that Scott's decision to slam his car into the rear of Harris's car when the two were traveling

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[3] Indeed, no one in the Cowata County Sheriff's Department had been trained in this maneuver. R.54, at 49-50.

[4] As the district court noted, "The parties dispute whether Scott slowed down or sped up." Pet. App. 33a. Harris has alleged that petitioner "sped up slightly," J.A. 29, and that fact must be taken as true on summary judgment.

at high speeds was an unreasonable use of deadly force under the circumstances and thus a violation of his Fourth and Fourteenth Amendment rights. Pet. App. 35a. Scott moved for summary judgment, claiming qualified immunity. *Id.* at 30a, 40a. The district court denied that motion, applying the two-part test for qualified immunity: (1) whether the officer's actions violated the Constitution, and if so, (2) whether the constitutional rule violated by the officer was clearly established at the time the officer acted. *Id.* at 42a.

The district court first determined that Scott's actions violated Harris's constitutional rights. Pet. App. 37a-40a. Scott clearly had "seized" Harris when he "rammed Harris's vehicle for the purpose of stopping it," the court held, *id.* at 37a, and that seizure was objectively unreasonable under the totality of the circumstances, *id.* at 38a. To assess the reasonableness of the seizure, the court applied the factors identified in *Graham v. Connor*, 490 U.S. 386 (1989): the severity of the underlying crime at issue; whether Harris posed an immediate threat to Scott or others; and whether Harris was attempting to evade arrest by flight. Pet. App. 38a.

The district court first noted that "prior to Reynolds' decision to instigate a high-speed chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone"; he had not "menaced" and was not "likely to menace others." Pet. App. 38a. Further, once the chase began, Harris "maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road." *Id.* at 39a. Although Scott claimed that the collision in the parking lot demonstrated Harris's dangerousness, "[a]ccording to the [police department's] official report . . . *Scott* rammed *Harris's* car." *Id.* (emphasis added). Further, when Scott decided to ram Harris's car to stop the chase, "there were no other motorists or pedestrians nearby, thus casting doubt" on Scott's claim that Harris "posed an immediate threat of harm to others." *Id.* Finally, the police had Harris's license plate

number, name, and home address and could have apprehended him "at a later time." *Id.* at 39a-40a. In light of all of those circumstances, the district court concluded that "Scott's use of force – ramming the car while traveling at high speeds – was not in proportion to the risk that Harris posed." *Id.* at 40a.

The district court then turned to the question whether it was "clearly established" at the time that Scott's conduct was unreasonable. Pet. App. 40a. Although it was indeed clear "the level of force appropriate in a situation depended, at least in part, on the crime the fleeing suspect was thought to have committed," *id.* at 41a (citing *Graham* and *Tennessee v. Garner*, 471 U.S. 1 (1985)), Scott had not even bothered to find out that the underlying offense was speeding, *id.* Further, although Scott "rel[ied] heavily on the crash in the parking lot to show Harris was dangerous," "a large part of the responsibility for the parking lot incident rests with Scott[,] who deliberately drove into Harris's line of traffic." *Id.* The district court thus concluded that if a jury accepted Harris's view of the facts, Scott had been given fair warning that his conduct was illegal. To the extent that a jury might disagree with Harris and accept Scott's characterization of the day's events, those factual disputes "require[d] submission to a jury" and made summary judgment inappropriate. *Id.* at 41a-42a.

3. The court of appeals affirmed the denial of qualified immunity. Pet. App. 1a-29a.

Turning first to whether the facts alleged by Harris demonstrate a violation of the Constitution, the court of appeals asked whether "the force used by Scott to effectuate the seizure was reasonable." Pet. App. 7a-8a. The court determined that the force administered by Scott was "deadly force," relying on case law holding that vehicles can be dangerous weapons, the Model Penal Code and Coweta County Sheriff Department's definitions of deadly force, and the

agreement of every officer in this case that Scott employed deadly force when he rammed Harris's car. *Id.* at 9a-10a & 24a n.8. The court noted that deadly force is appropriate only in "limited circumstances," namely, where: (1) "'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others'" or "'threatens the officer with a weapon'" or "'there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm'"; (2) "if deadly force 'is necessary to prevent escape,'" and (3) "'if, where feasible, some warning has been given.'" App. 9a (quoting *Garner*, 471 U.S. at 11-12).

Here, "[n]one of the antecedent conditions for the use of deadly force existed." Pet. App. 11a. The pursuit began when Harris was observed speeding; there were "no warrants out for his arrest"; Harris posed "little, if any, actual threat to pedestrians or other motorists"; "there is no question that there were alternatives for a later arrest"; and "absolutely no warning was given." *Id.* at 11a, 25a n.10. As a result, the court of appeals concluded, the facts viewed favorably to Harris establish a violation of his Fourth Amendment right to be free from an unreasonable seizure. *Id.* at 12a-13a.

The court of appeals then considered whether the law at the time of the incident was sufficiently clear to give Scott "'fair notice'" that his actions were unlawful. Pet. App. 15a (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Case law made clear that "an automobile, like a gun, could be used as a deadly instrument." Pet. App. 15a-16a (citing cases). And since *Garner*, the court stated, "officers have been on notice that they may not use deadly force to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury" and the other *Garner* preconditions are met. *Id.* at 15a, 17a-18a. Because those preconditions were not met in this case, the court held, a rea-

sonable officer would have had fair warning that the Fourth Amendment was violated. *Id.* at 20a.

In so holding, the court distinguished *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), which reversed a denial of qualified immunity, finding the facts of that case to be entirely inapposite: there, the suspect was "a suspected felon with a no-bail warrant out for his arrest," who "had a violent physical encounter prior to the shooting"; the police officer "had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens" because it looked like the suspect was grabbing a gun; and the police officer warned the suspect before shooting. Pet. App. 18a.

SUMMARY OF ARGUMENT

I. Scott violated the Fourth Amendment when he intentionally slammed into Harris's vehicle with his police cruiser at a high speed in order to apprehend him for speeding.

The reasonableness of an officer's use of deadly force to apprehend a suspect is assessed under the clear standards set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985): whether the suspect has threatened the officer or is suspected of a violent crime; the infliction of force likely to kill is the only means of preventing escape; and the suspect is given a warning where feasible. The Solicitor General suggests that these standards do no apply here because Scott's violent, high-speed, intentional collision with Harris's car was not likely to cause serious injury or death. The suggestion is frivolous, as anybody who has ever driven a car on a highway knows. Indeed, every officer in this case agreed that Scott's conduct was an act of deadly force, and an overwhelming amount of legal authority – cases, statutes, and police department policies – confirms the point. The Solicitor General's related suggestion that *Garner* applies only to the use of guns is likewise indefensible.

Judging Scott's conduct under the standards set forth in *Garner*, it is clearly unreasonable. Harris posed no imminent risk of harm to Scott or others; Harris was being chased for a traffic offense; Harris plainly could have been apprehended later; and Scott made no attempt to warn Harris before running him off the road at 80 miles per hour.

II. At the time of the events in this case, it was clearly established that Scott's conduct violated Harris's Fourth Amendment rights. At the time Scott acted, a reasonable officer in his position plainly would have known that ramming Harris's car was an unreasonable use of deadly force. *Graham* and *Garner* had established specific standards for the deployment of deadly force, and those standards applied with "obvious clarity" to the facts of this case. *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Further, although there need not be a case with "materially similar" facts to give notice to an officer that his conduct was illegal, *Hope*, 536 U.S. at 741, numerous cases confirmed the application of *Garner* and *Graham* to this type of situation. And the undisputed fact that the policies of almost every American law enforcement agency, state and federal, prohibit the use of deadly force in these circumstances confirms beyond any doubt that Scott should have known that using deadly force against Harris was unreasonable.

ARGUMENT

Harris's qualified immunity claim is analyzed under the familiar two-step inquiry set out in *Saucier v. Katz*, 533 U.S. 194 (2001). First, this Court considers whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. Second, if the facts alleged demonstrate a constitutional violation, the Court considers whether the right at issue was "clearly established," that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02.

Conduct may be clearly unlawful "even in novel factual circumstances" when "'a general constitutional rule already identified in the decisional law'" applies "'with obvious clarity'" to the conduct at issue. *Hope*, 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 270-71).

In this case, Scott's ramming of Harris's vehicle – an application of deadly force – was an objectively unreasonable seizure that violates the Fourth Amendment. Further, the law was sufficiently clear at the time of the incident to put a police officer on notice that conduct like Scott's was unreasonable and therefore unlawful.

I. SCOTT'S USE OF DEADLY FORCE TO STOP HARRIS'S FLIGHT WAS UNREASONABLE AND THUS VIOLATED THE FOURTH AMENDMENT

A. The *Garner* Standards Prohibit The Use Of Deadly Force Unless Three Clear Conditions Are Satisfied

A claim that a police officer used excessive force during a seizure is a Fourth Amendment claim, judged under the "objective reasonableness" standard that balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). The "'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Id.* at 395-96. If, considering the "totality of the circumstances," the use of force is unreasonable, then the Fourth Amendment has been violated. *Garner*, 471 U.S. at 9.

Although the right to make a stop or arrest "necessarily carries with it the right to use some degree of physical coercion," different levels of force are appropriate in different factual circumstances. *Graham*, 490 U.S. at 396. The appropriate level of force depends on "the severity of the crime

at issue"; "whether the suspect poses an immediate threat to the safety of the officers or others"; and "whether he is *actively* resisting arrest," as opposed to "attempting to evade arrest by flight." *Id.* at 396 (emphasis added). Courts reviewing the use of force assess these factors "from the perspective of a reasonable officer on the scene" who may be "forced to make [a] split-second judgment[] . . . about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court applied the Fourth Amendment's general reasonableness standard to a particular type of force – deadly force, the most extreme force possible. As the *Garner* Court explained, the constitutionality of an application of deadly force, like any claim of excessive force during a seizure, is evaluated under the Fourth Amendment's balancing test for reasonableness. *Id.* at 7-9.

In determining when the use of deadly force is reasonable, the Court specifically relied upon the policies already adopted by police departments. It emphasized that "a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects." 471 U.S. at 10-11. Accordingly, the Court firmly rejected the suggestion that the use of deadly force to apprehend any felony suspect is per se reasonable. *Id.* Deadly force is reasonable if, but only if, the suspect is demonstrably dangerous, i.e., "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Id.* at 11-12. Even then, two other conditions must be satisfied: deadly force is "necessary to prevent escape," and "where feasible, some warning has been given." *Id.*

B. The *Garner* Standards Govern This Case

We explain below why, when applied to this case, the *Garner* standards unambiguously precluded the use of

deadly force under the circumstances faced by deputy Scott. *See infra* Part I.C.[5] We first respond, however, to the Solicitor General's extraordinary suggestion that the *Garner* standards do not apply here at all. *Garner* does not apply, the Solicitor General suggests, because (a) this case does not involve "deadly force," and (b) even if it did, *Garner* is limited only to deadly force cases involving the shooting of a suspect with a gun. These arguments are both wrong and irrelevant.

1. The suggestion that this case does not involve deadly force (Pet'r Br. 14; U.S. Br. 15-16) is, in a word, frivolous. Scott was traveling at a speed between 70 and 90 miles per hour when he sped up and slammed directly into back of Harris's vehicle with his police cruiser. *See* Pet. App. 3a-4a; R.36, Ex. A at 22:48:02 ("We're running about 90 now. . ."). That act constitutes deadly force under every definition and conception known to American law.

The Model Penal Code defines "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (2001); *see Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (essentially adopting that definition). There is widespread agreement on this definition in the law enforcement community. *See, e.g.*, R.48, Ex. 12, at 82 (Coweta County Sheriff Department defines "deadly force" as "force which, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury"); U.S. Br.

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[5] As an preliminary matter, there can be no doubt that Harris was "seized" within the meaning of the Fourth Amendment when Scott used his police cruiser to hit Harris's car. "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Garner*, 471 U.S. at 7; *see also Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (noting that a police officer's hitting a fleeing car and causing it to crash is a seizure).

15 n.4 (United States Department of Justice policy defines "deadly force" as "any force that is likely to cause death or serious physical injury"). Anyone who has ever driven a car at 80 miles an hour knows that slamming into another car traveling at that speed is likely to cause death or serious injury.

Indeed, it is for precisely that reason that so many states have treated the intentional or reckless use of cars to cause injury as the unlawful use of deadly instruments. Several state statutes criminalizing aggravated assault and battery note that a vehicle may be a "dangerous instrument," which is an instrument generally capable of causing death or serious bodily injury.[6] At least one state's criminal code explicitly includes motorized vehicles in its definition of "deadly weapon."[7] Similarly, the myriad state laws criminalizing the

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[6] *See, e.g.*, Ala. Code § 13A-1-2(5) (2006) (a "[d]angerous [i]nstrument" is "[a]ny instrument . . . which . . . is highly capable of causing death or serious physical injury," including a "vehicle"); Conn. Gen. Stat. Ann. § 53a-3 (West 2006) ("'Dangerous Instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury, and includes a 'vehicle' . . ."); N.Y. Penal Law § 10.00 (McKinney 2006) ("'Dangerous instrument' means any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.").

[7] *See* Wyo. Stat. Ann. § 6-1-104 (2006) ("'Deadly weapon' means but is not limited to a firearm, explosive or incendiary material, motorized vehicle, an animal or other device, instrument, material or substance which in the manner it is used or is intended to be used is reasonably capable of producing death or serious bodily injury."); *see also* Wis. Stat. Ann. § 968.20 (West 2006) (statute governing return of seized property assumes that a "motorized vehicle" may be a "dangerous weapon"). Further, other state statutes, such as those addressing the consequences of criminal convictions on driver's licensing, recognize that a person may commit a crime by using a vehicle as a deadly weapon. *See, e.g.*, Cal. Vehicle Code § 13351.5 (West 2006) (revocation upon felony conviction

effects of dangerous driving – such as vehicular homicide statutes[8] and vehicular assault statutes[9] – demonstrate that a car may be used on the roads as a deadly instrument.

State case law similarly abounds with judicial determinations not only that vehicles have the *potential* to be used as deadly weapons, but that they *have* been used as deadly weapons in circumstances similar to Scott's ramming of Harris's car in this case. For example, courts have found that a defendant was using deadly force when driving recklessly or dangerously[10]; when using his vehicle offensively towards a victim or a police officer[11]; and when – most pertinent here – intentionally crashing into another vehicle.[12]

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in which court finds that vehicle was used as deadly weapon); Or. Rev. Stat. Ann. § 809.235 (West 2005) (revocation upon conviction for murder or manslaughter where court finds that a motor vehicle was intentionally used as a dangerous weapon).

[8] *See, e.g.*, Colo. Rev. Stat. § 18-3-106 (2006); S.D. Codified Laws § 22-16-41 (2006); Wash. Rev. Code Ann. § 46.61.520 (West 2006).

[9] *See, e.g.*, Colo. Rev. Stat. § 18-3-205 (2006); Del. Code Ann. tit. 11, §§ 628-29 (2006); Mont. Code Ann. § 45-5-205 (2006); N.H. Rev. Stat. Ann. § 265:79 (2006); N.Y. Penal Law § 15.05, subd. 4, 120.03 (McKinney 2006); Ohio Rev. Code Ann. § 2903.08 (West 2006); Tenn. Code Ann. § 39-13-106 (West 2006); Wash. Rev. Code Ann. § 46.61.522 (West 2006).

[10] *State v. Jones*, 538 S.E.2d 917, 922 (N.C. 2000) (upholding assault conviction and finding it "well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner").

[11] *See, e.g.*, *Adams v. State*, 634 S.E.2d 868, 870 (Ga. Ct. App. 2006) (driver speeding at 90 miles per hour toward police officers); *State v. Batchelor*, 606 S.E.2d 422, 424 (N.C. Ct. App. 2005) (an automobile driven at high speed is a deadly weapon as a matter of law); *Sheffield v. State*, 607 S.E.2d 205, 206 (Ga. Ct. App. 2004) (speeding driver using car offensively against police officer during high-speed chase guilty of aggravated assault on a police officer); *Urbigkit v. State*, 67 P.3d 1207, 1225 (Wyo. 2003) (car driven at drug task force agents was a deadly weapon); *Dyer v. State*, 585 S.E.2d 81, 82-83 (Ga. Ct. App. 2003)

Unsurprisingly, numerous federal precedents have noted that a police officer who uses his or her squad car to apprehend a suspect is using deadly force. *See, e.g., Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) ("an attempt to hit an individual with a moving squad car is an attempt to apprehend by use of deadly force"); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949-50 (7th Cir. 1994) (assuming striking fleeing motorcycle with police car was deadly force); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) ("[M]any law enforcement tools possess the potential for being deadly force, including . . . a police officer's vehicle.").

Similarly, numerous police department policies explicitly define deadly force to include use of a police vehicle to stop a suspect. *See, e.g.*, R.45, Alpert Aff. at 8-9 (California Commission on Peace Officer Standards defines "deadly force" to include forcible stopping with a vehicle and equates it with "the use of firearms"); Minneapolis, Minn., Police Dep't Manual § 7-407.03, *available at* http://www.ci.minneapolis.mn.us/mpdpolicy/7-400/7-400.asp ("Vehicle contact . . . may only be used when state law permits use of

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(swerving vehicle "at pursuing officers in an offensive manner" was aggravated assault); *People v. Claborn*, 36 Cal. Rptr. 132, 133 (Cal. Ct. App. 1964) (aiming at and hitting victim's vehicle head-on was assault with a deadly weapon).

[12] *See, e.g., Clark v. State*, 746 So. 2d 1237, 1239 (Fla. Dist. Ct. App. 1999) (aggravated battery conviction when defendant rammed another vehicle with his truck twice); *Taylor v. State*, 881 P.2d 755 (Okla. Crim. App. 1994) (defendant used car as "dangerous weapon" when he rammed wife's vehicle 20 times without regard to safety of wife or children); *Blalock v. State*, 299 S.E.2d 753, 754 (Ga. Ct. App. 1983) (aggravated assault conviction when defendant rammed the side of another vehicle while traveling at 25 mph); *People v. Blacksmith*, 238 N.W.2d 810, 813 (Mich. Ct. App. 1975) (swerving at officer during high-speed chase was felonious assault); *see also United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) (per curiam) ("It is indisputable that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon.").

deadly force."); Portland, Ore., Police Dep't Policy & Procedure § 630.05 (Pursuit Intervention Strategies), *available at* http://www.pursuitwatch.org/pursuit_policies/Portland_Oregon.pdf ("Ramming is considered deadly physical force. . . ."); *see also* NPAP Br. 15-17.

Perhaps most decisively, all of the police officers involved in this case agreed that Scott's ramming of Harris's vehicle with his police cruiser was "deadly force." *See* Pet. App. 24a n.8. Scott himself agreed that his action constituted the use of deadly force. R.48, at 18-22, 157-58. Scott's supervisor understood his authorization to "[g]o ahead and take him out" as an authorization for the use of deadly force. R.50, at 54-55, 62-63. Deputy Reynolds, who initiated the pursuit, likewise knew that Scott used deadly force. *See* R.49, at 118-19. And both sides' experts below described the action as deadly force. *See* R.45, Alpert Aff. at 11 (Harris's expert); R.57, at 171-72 (Scott's expert).[13]

Against all of this, the Solicitor General offers the meaningless observation that "the use of a vehicle to stop a fleeing suspect may not amount to deadly force in any number of circumstances." U.S. Br. 16; *see also* Pet'r Br. 14. Of course not. Police cruisers are often used to set up visible roadblocks, or to cut off an exit from a road or parking lot. Many low-speed interventions do not risk incredibly violent accidents. The question here is not whether *every* use of a police vehicle to stop a suspect presents a substantial risk of serious injury or death. It is whether *this* use of a vehicle risked se-

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[13] Notably, even the Solicitor General and Scott acknowledge – albeit unwittingly – that Scott applied deadly force to Harris. Both contend that Harris, in fleeing at high speeds, posed a potentially deadly threat to other motorists on the road. U.S. Br. 16 ("A vehicle poses a potentially deadly risk to others, and a suspect operating a vehicle in a reckless fashion is thus *always* dangerous."); Pet'r Br. 10 ("an automobile is a dangerous instrumentality" (internal quotation marks omitted)).

rious injury or death. On that question, it is not even a close call.

2. The Solicitor General also suggests that *Garner* should not apply here because *Garner* governs *only* police shootings, which are the most likely to cause serious injury or death. U.S. Br. 15. This argument, too, is frivolous. There is not a word in *Garner* that limits its analysis exclusively to the use of guns. To the contrary, *Garner* explicitly discusses the use of deadly force through means other than guns, such as through "a hand-to-hand struggle." 471 U.S. at 11-12, 14.

Nor is there any logic to the Solicitor General's suggestion that guns are subject to unique constitutional analysis because they are more likely than other means of restraint to cause serious injury or death. Many methods of force can be applied to create a risk of serious injury or death – certainly an 80-mile-an-hour vehicular collision on a narrow highway is at least as likely to result in injury or death as a gunshot somewhere in the direction of a fleeing suspect. What *Garner* recognizes is that police officers sometimes must apply force that is deadly *because it is deadly* – the suspect *must be stopped* despite the predictable consequences. The use of such force may be permissible, even desirable, when it is *actually necessary* – but when it is not, the fact that the suspect lies dead from a gunshot wound, or suffocating chokehold, or a violent vehicular collision, is constitutionally irrelevant. Because all different types of deadly force pose essentially the same risks, there is no basis for applying different constitutional standards to assess the reasonableness of each of them. The same standards must and do govern the officer's choice to restrain by any means objectively likely to kill.

3. Finally, the question whether "*Garner* applies" or "*Graham* applies" is in any event a red herring – the two tests are substantively identical. *Garner* is merely an application of the test generalized in *Graham*, as the latter case

makes clear. Not only does *Graham* cite *Garner* with approval as an example of the proper "analy[sis] under a Fourth Amendment standard," 490 U.S. at 394-95, *Graham* specifically relies on *Garner* to define the factors relevant to claims of excessive force during seizures generally, *id.* at 396. Because the two cases use essentially the same factors in assessing reasonableness, *compare Graham*, 490 U.S. at 396, *with Garner*, 471 U.S. at 11-12, the outcome under either case is the same.

C. Scott's Use Of Deadly Force Was Unambiguously Unreasonable Under The *Garner* Standards

As noted above, deadly force is permissible under *Garner* only when three conditions are met: (1) the suspect has threatened the officer with a weapon, or there is probable cause to believe he has committed a crime involving serious physical harm; (2) only the use of deadly force will prevent escape, and (3) a warning is given where feasible. *Garner*, 471 U.S. at 11-12. When the disputed facts are viewed in the light most favorable to Harris, *see Saucier*, 533 U.S. at 201, none of the *Garner* factors was present when Scott decided to speed up and slam into Harris's vehicle at 80 miles per hour on a narrow highway.

1. The first factor involves the nature of the risk the suspect poses. A direct threat to an officer indicates an obvious risk, 471 U.S. at 11, but Harris made no such threat here.[14]

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[14] The Solicitor General suggests that Harris had threatened Scott because he "struck petitioner's vehicle" in the shopping mall parking lot during the chase. U.S. Br. 13, 18. The Solicitor General has the facts backwards: on the record that controls here, Scott struck Harris in an attempt to stop him, not the other way around. Pet. App. 39a; *see also* R.46, Ex. 1 (police report) ("one Coweta County unit ram[med] the Cadillac"). This case is thus unlike cases involving the use of deadly force against fleeing suspects who *did* use their cars to pose direct physical threats to officers. *See, e.g., Scott v. Clay County*, 205 F.3d 867, 872, 876-78 (6th Cir. 2000) (car accelerating into officer's path).

Absent such a threat, this factor turns critically on the offense the suspect is believed to have committed. *Garner* recognizes the common-sense proposition that a suspect who has committed a violent crime is more likely to pose a danger to police officers and others during flight than a person suspected of committing a minor offense. *Id.* at 11-12. And it is more important to apprehend a person who is suspected of committing a serious crime because he is more dangerous to the public if he escapes. *See id.* As Scott himself notes, "police generally have the option of calling off the pursuit" to "lessen the risk[s]" posed to police officers and others, Pet'r Br. 11, which is a crucial alternative when the suspect's crime is minor. Indeed, many state and local police policies specifically prohibit the use of deadly force when the underlying crime is minor, reflecting law enforcement's agreement that it is "not better that all felony suspects die than that they escape." *Garner*, 471 U.S. at 11; *see id.* at 19-20 (citing law enforcement policies prohibiting use of deadly force to demonstrate unreasonableness of use).[15]

This crucial factor clearly did not justify Scott's use of deadly force to stop Harris's controlled vehicular flight from a speeding ticket. Harris had not threatened Scott with a weapon, nor had he committed a crime involving serious physical harm, nor was he likely to commit one. Pet. App. 2a; *see also* R.49, at 77 (Reynolds admits that if Harris had slowed down, he would not have even initiated a traffic

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[15] *See, e.g.*, Ga. Code Ann. § 17-4-20(b) (West 2006) (deadly force allowed "when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm"); U.S. Br. 15 n.4 (Department of Justice policy only allows use of deadly force to prevent a suspect's escape when "the suspect has committed a felony involving the infliction or threatened infliction of serious physical injury or death" and "the escape of the subject would pose an imminent danger of death or serious physical injury"); Pet. App. 34a (Coweta County Sheriff's Office policy requires officers to "weigh[] the pertinent factors," including "the gravity of the offense").

stop); Pet App. 38a (Harris had not "menaced" and was not "likely to menace others"). There were no warrants out for his arrest. He was a kid who had been speeding, trying to evade arrest because he was scared and wanted to get home without paying an impound fee. *See* Pet. App. 31a. He exceeded the speed limit and passed other cars against the yellow line, to be sure, but few drivers are innocent of those offenses – and police officers generally do not regard such traffic violations as so dangerous as to warrant violent, deadly police action in response. Yet Scott, for his part, knew only that Harris was being pursued and refused to stop – Scott did not even attempt to discover *why* Harris was being pursued before deciding to ram his car. R.48, at 116-17. A reasonable officer, by contrast, would have understood that nothing Harris had done justified Scott's decision to "take him out."

The Solicitor General suggests that the severity of the underlying offense is of little import because "[r]egardless of why a driver chooses to flee the police . . . he constitutes the same threat to the public behind the wheel." U.S. Br. 7; *see also id.* at 16, 19. As an initial matter, it simply is not true that every suspect fleeing the police in a car poses the same risk. There is an obvious difference between a suspect who maintains control of his vehicle and avoids other cars and pedestrians (like Harris did here) and a suspect who aggressively drives his vehicle directly at police officers and pedestrians. More fundamentally, the underlying offense matters because, for example, a person who has committed a violent felony is more likely to use more extreme and dangerous measures to avoid capture and the greater punishment associated with a violent felony.

Finally, Harris's driving did not pose an immediate risk of serious bodily injury or death to others. During the chase, Harris "remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns." Pet. App. 12a. Once he left the shopping mall parking lot,

the police began blockading roads. As a result, there were very few other cars in the area. Indeed, Scott himself admitted that there were "no motorists in the area" when he struck Harris. J.A. 8-9; *see id.* at 29-30. Although Harris may not have known the roads were blocked off, U.S. Br. 17-18, Scott *did* know that, and a reasonable officer should have realized that the blockades meant that Harris's controlled flight posed little risk to the general public. Further, the fact that Harris did not threaten any pedestrians or run other motorists off the road distinguishes this case from others holding that deadly force was justified. *See, e.g.*, *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002). The Solicitor General suggests that deadly force was warranted because Harris could have "los[t] control at any moment," U.S. Br. 17, but that possibility does not rise to the level of the "*immediate* threat" required for the use of deadly force, *Garner*, 471 U.S. at 11 (emphasis added), particularly where the suspect's death or serious bodily injury was certain to result.

2. The second *Garner* factor is whether killing the suspect is the only reasonable means of preventing his escape. Not every suspect of a crime should be pursued at high speed, especially when the suspect could be apprehended later by other means. *Garner*, 471 U.S. at 9 n.8 ("the failure to apprehend at the scene does not necessarily mean that the suspect will never be caught"). This is a factor police departments train their officers to consider before using deadly force. *See, e.g.*, Pet. App. 34a (Coweta County Sheriff's Office policy advises an officer to discontinue pursuit "'upon receipt of additional information . . . that would allow later apprehension and successful prosecution'"); Portland, Ore., Policy & Procedure, § 630.05 (Prohibited Pursuits), *available at* http://www.pursuitwatch.org/pursuit_policies/Portland_Oregon.pdf (no pursuit allowed of "persons whose identities are known, who can be apprehended at a future time").

In this case there is absolutely "no question that there were alternatives for a later arrest" of Harris. Pet. App. 11a. Deputy Reynolds took down Harris's license plate number and was able to obtain his home address, *id.* at 2a, and Scott "personally observed Harris at very close range" during their altercation in the parking lot, Pet'r Br. 19. The police plainly could have gone to Harris's home once the situation had diffused and given him a speeding ticket. Instead, Reynolds chose to initiate a high-speed pursuit, and Scott chose to unilaterally join that pursuit after hearing it broadcast on the police radio. Scott's failure to even *consider* whether Harris could have been apprehended later was unreasonable.

The Solicitor General does not dispute that Harris easily could have been picked up later, with no risk to him, the officers, or the public. In tacit acknowledgment that this factor, if applied here, plainly would have precluded the use of deadly force, the Solicitor General argues that the factor should simply be ignored. According to the Solicitor General, it "creates a perverse and dangerous regime in which police officers are effectively required to let suspects fleeing by vehicle escape." U.S. Br. 21. Again, the Solicitor General attacks a straw man. Nobody contends that officers are "effectively required" to let all suspects escape. The premise of *Garner* is that *some* suspects – those who do not pose a serious risk of harm – must be allowed to escape, if the only alternative is to kill them instead. If the Solicitor General means to suggest that it is better that all misdemeanor suspects die than that they escape, the suggestion is indefensible, not to mention squarely contrary to *Garner*, *see* 471 U.S. at 11; *accord Waterman v. Batton*, 393 F.3d 471, 483 (4th Cir. 2005 (Motz, J., dissenting) ("No matter how exasperated an officer becomes, the Constitution does not permit him to shoot a motorist for speeding.").

3. Finally, *Garner* unambiguously precluded the use of force here because it holds that the use of deadly force is rea-

sonable *only* when the officer first gives a warning, if feasible – *even* as to homicidal felons when no other alternative is present. Harris, a scared teenager stupidly trying to speed home and away from the police, did not even get the benefit of a loudspeaker warning that if he did not pull over, he would be slammed off the narrow highway at high speed. Nobody here denies that it was feasible to warn Harris that deadly measures were imminent, nor does anybody contend that Harris would not have heeded such a stark warning. Instead, with no warning and no justification, Scott suddenly acted to "take him out."

Scott's decision to kill Harris rather than let him escape and be picked up at home minutes later was patently unreasonable under *Garner*'s clear standards.

D. Police Department Policies Nationwide Sharply Underscore The Unreasonableness of Scott's Action

Many police departments have specific policies establishing that ramming a suspect's car is an application of deadly force and is presumptively unreasonable. "If those charged with the enforcement of the criminal law have abjured" the practice, it makes little sense for the judiciary to pronounce the practice reasonable. *Garner*, 471 U.S. at 11; *see also id.* at 18 (relying on "the policies adopted by the police departments themselves" to establish unreasonableness).

Numerous police department policies outright prohibit vehicular contact with suspects or suspects' vehicles. For example, the International Association of Chiefs of Police Model Pursuit Policy states: "Officers may not intentionally use their vehicle to bump or ram the suspect's vehicle in order to force the vehicle to a stop off the road or in a ditch." R.45, Alpert Aff., at 8. Similarly, Virginia's model pursuit policy states that "[o]fficers shall not intentionally ram, bump, or collide with a fleeing vehicle . . ." Virginia Po-

lice/Sheriff's Department General Order No. 2-9, at 2-9.18 (July 1, 1999), *available at* http://pursuitwatch.org/pursuit_policies/Virginia_Model.pdf. Those law enforcement agencies that do not completely ban vehicular contact limit its uses to very narrow circumstances. *See, e.g.*, Utah Vehicle Pursuit Model Policy, Part V(A)(3)(c), *available at* http://www.urmma.org/model_policies/Vehicle_Pursuit/vehicle_pursuit.html ("ramming" is a "last resort measure," to be used only when "all reasonable alternative means of apprehension have been considered and rejected"); U.S. Br. 19 n.6 (National Park Service prohibits ramming unless all "other reasonable alternatives have been exhausted"); *see generally* NPAP Br. 13-20.

The fact that police departments and federal agency policies across the board prohibit or severely limit the practice of ramming a suspect's vehicle to apprehend him demonstrates just how far outside the mainstream of accepted law enforcement practices Scott was acting when he chose to slam Harris off the road at high speed.[16]

II. IT WAS CLEARLY ESTABLISHED THAT DEADLY FORCE WAS UNREASONABLE UNDER THE CIRCUMSTANCES HERE

A police officer whose conduct violates the Constitution is nevertheless entitled to qualified immunity unless the constitutional proscription is "clearly established." "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. A right may be

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[16] This case does not present an opportunity to assess the appropriateness of police officers performing a PIT maneuver, because it is undisputed that Scott did not perform a PIT maneuver in this case, and, indeed, could not have done so under the circumstances. *See, e.g.*, Pet. App. 4a; R.57, at 198, 201-02.

clearly established even if "the very action in question" has not "previously been held unlawful," so long as its unlawfulness is "apparent" in "light of pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Put another way, "general statements of the law are not inherently incapable of giving fair and clear warning," and sometimes "a general constitutional rule already identified in the decisional law may apply with obvious clarity" to the conduct at issue. *Lanier*, 520 U.S. at 271.

Even in contexts where the constitutional inquiry is often fact-dependent, a plaintiff need not point to precedent with facts "materially similar" to the conduct at issue to defeat qualified immunity. *Hope*, 536 U.S. at 741. "'There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" *Lanier*, 520 U.S. at 271 (quoting *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting)).

In determining whether an officer had "fair warning" that his actions were unconstitutional, Supreme Court precedent, court of appeals precedent, and law enforcement policies are all relevant. *Hope*, 536 U.S. at 741-45 (considering judicial precedent, as well as Department of Justice and state law enforcement policies).

In this case it was clearly established at the time of the high-speed chase that ramming without warning a person who was observed speeding, but who was not otherwise dangerous, and who could have been apprehended later violated the Fourth Amendment.

As a starting point, "there is no doubt that *Graham* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier*, 533 U.S. at 201-02. And *Graham* and *Garner* together identify the fac-

tors an officer must consider before deciding what amount of force is appropriate, including specific conditions that must be met before a suspect can be killed to prevent escape. *See, e.g.*, *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 8 (1st Cir. 2005) (finding that *Graham* and *Garner* provide the requisite fair warning to police officers).

These factors apply with "obvious clarity" to Scott's conduct in this case. *Lanier*, 520 U.S. at 270-71. Nobody suggests that Scott considered all of the relevant factors, found that different factors pointed in different directions, and then made a judgment call that deadly force was warranted. Instead, Scott readily admits that he *did not even consider* several of the conditions this Court identified as critical in deadly force cases: the seriousness of the underlying offense, whether later apprehension of the suspect was possible, and whether a warning could be given. As the court of appeals found, "*none* of the limited circumstances identified in *Garner* that might render this use of deadly force constitutional are present here." Pet. App. 11a; *see also supra* pp. 18-23.

The Solicitor General suggests that *Garner* does not apply with "obvious clarity" to Scott's conduct because of the Court's per curiam decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004). *See* U.S. Br. 24-25. In the Solicitor General's view, because the Court found that the conduct at issue in *Brosseau* – which involved a police officer shooting a suspect fleeing in a vehicle – did not violate a clearly established right, Scott likewise could not have had sufficient notice that his conduct violated a clearly established right. *See id.* But just as this case is an easy case because none of the *Garner* factors is met, *Brosseau* was an easy case because they *all* were met. The suspect in *Brosseau* was a suspected felon with a no-bail warrant out for his arrest; he had been in a fight right before the police arrived; as he escaped through a residential neighborhood, he posed a threat to three police

officers on foot and three adults and a child in small cars; the police believed he had a weapon in his vehicle; the police officers used escalating levels of force before resorting to deadly force; and the police gave a warning before using deadly force. *See Brosseau*, 543 U.S. at 195-97; *see also* Pet. App. 18a-19a & 27a n.14. The Court's holding that the plaintiff did not have a clearly established right to be free from a police gunshot on those facts says nothing at all about the clarity with which *Garner* speaks to Harris's case. Indeed, the *Brosseau* Court specifically noted that the *Garner* standard can "clearly establish" whether the use of deadly force is unreasonable in an "obvious case," 543 U.S. at 199 – and this is an obvious case.

In addition to the specific guidance provided by *Garner*, court of appeals precedent and law enforcement policies clearly established Harris's right. First, there was ample judicial authority to support the common-sense proposition that a police officer's ramming of his vehicle into a suspect's vehicle is an application of deadly force. *See, e.g.*, *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) ("many law enforcement tools possess the potential for being deadly force" including "a police officer's vehicle"); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986) ("high-speed pursuits are no different than the use of firearms to apprehend fleeing suspects"); *see also supra* pp. 14-15. Law enforcement agencies have likewise routinely recognized that "ramming" a suspect's vehicle is an application of deadly force. *See supra* pp. 15-16.

Further, it was well-established that using deadly force without a warning to apprehend a nonviolent suspect who could have been apprehended later is unconstitutional. *Garner* itself is amply clear, and, at the time of the incident here, there were numerous court of appeals precedents applying *Garner* to find that use of deadly force against a fleeing nonviolent suspect was unconstitutional. *See, e.g.*, *Acosta v.*

City & County of S.F., 83 F.3d 1143, 1146-47 (9th Cir. 1996) (no qualified immunity where police officer shot person suspected of purse snatching who posed no danger to police as he drove away); *Ludwig v. Anderson*, 54 F.3d 465, 467-69 (8th Cir. 1995) (qualified immunity inappropriate where "emotionally disturbed" person – who was not suspected of any crime – ran away from the police and police officers hit him with a police cruiser and shot him without first providing a warning).[17]

The Solicitor General argues that an Eleventh Circuit precedent, *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923 (11th Cir. 1993) (en banc), *adopting dissenting opinion in* 962 F.2d 1563 (11th Cir. 1992), would have suggested to Scott at the time of the chase that his conduct was lawful. But *Adams* held only that ramming a suspect's car was not clearly a "seizure" in 1985, when the incident occurred; the court specifically held "we need not decide today whether the Fourth Amendment was violated." 962 F.2d at 1574-77. Subsequent to the incident in *Adams*, but long before the incident here, this Court made clear in *Brower v. County of Inyo*, 489 U.S. 593 (1989), that when a police officer hits a fleeing car and causes it to crash, there *has* been a "seizure" under the Fourth Amendment, *id.* at 597. *Adams* was thus irrelevant by the time Scott acted.[18]

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[17] And more recent precedent confirms the unlawfulness of Scott's actions. *See Vaughan v. Cox*, 343 F.3d 1323, 1326-27 (11th Cir. 2003) (Cox, J.) (no qualified immunity when police officer intentionally caused two suspects' truck to crash into his police car and shot the suspects during a high-speed chase); *see also, e.g., Sigley v. City of Parma Heights*, 437 F.3d 527, 533-37 (6th Cir. 2006) (no qualified immunity when officer shot suspect driving away from drug deal); *Smith v. Cupp*, 430 F.3d 766, 773-75 (6th Cir. 2005) (no qualified immunity when officer shot person suspected of making threatening phone calls who tried to escape in police car).

Not only did decisional law provide clear notice to Scott, but the policies of law enforcement agencies nationwide made equally clear that ramming Harris's vehicle was not a reasonable means of apprehending him. *See supra* pp. 23-24. Those policies provide powerful evidence that any reasonable police officer would have known that Scott's actions were out of line. *See Hope*, 536 U.S. at 741-42; *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

In sum, this is not a case exploring the "hazy border" between acceptable and excessive force. *Saucier*, 533 U.S. at 206 (internal quotation marks omitted). It is a case involving a police officer who failed even to consider the steps a reasonable officer would take before deciding whether to risk killing a misdemeanor, traffic-offense suspect, rather than let him speed away under control. Having failed to consider whether the very limited conditions justifying the use of deadly force were present, it should come as no surprise to

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[18] Further, the fact that a smattering of cases in the various federal courts of appeals have found qualified immunity appropriate in markedly different circumstances says little about the reasonableness of petitioner's conduct here. In all but one of the cases cited by Scott and the Solicitor General, the suspects posed a direct and immediate danger to police officers or others, clearly distinguishing them from Harris. *See, e.g., Scott v. Clay County*, 205 F.3d at 877 (suspect accelerated toward the police and drove a motorist off the road); *Cole v. Bone*, 993 F.2d 1328, 1331-34 (8th Cir. 1993) (driver of truck forced more than 100 cars off the road, endangered motorists, and attempted to ram several police cars; chase lasted 50 miles); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (suspect drove directly into officers on a residential dead-end street); *Weaver v. State*, 73 Cal. Rptr. 2d 571, 574-76 (1998) (pursuit became dangerous because it "had lasted over an hour and had covered several freeways"). The remaining case, *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994), like *Adams*, is inapposite because the court of appeals based qualified immunity on a split in the federal circuits at the time of the incident "about whether the intentional use of a deadman roadblock" was a seizure, *id.* at 953, a conflict that was subsequently resolved in *Brower*.

Scott that they were not. His conduct was patently unlawful, as he had every reason to know.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1625 Eye Street, N.W.
Washington, D.C. 20006

JONATHAN D. HACKER
(Counsel of Record)
NICOLE A. SAHARSKY
SUSAN M. MOSS*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Idaho only*

Attorneys for Amicus Curiae

January 17, 2007

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(11)

No. 05-1631

IN THE

Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA DEPUTY SHERIFF, *Petitioner*,

v.

VICTOR HARRIS, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT IN SUPPORT OF RESPONDENT

HOWARD FRIEDMAN
MYONG J. JOUN
NATIONAL POLICE ACCOUNTABILITY PROJECT
14 Beacon Street, Suite 701
Boston, MA 02108
(617) 227-6015

KAREN BLUM*
SUFFOLK UNIVERSITY LAW SCHOOL
120 Tremont Street
Boston, MA 02108
(617) 573-8216
* *Counsel of Record*

Attorneys for Amicus Curiae

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild (NLG), the first racially integrated national bar association.[1] NPAP was founded with the intent of helping to end police abuse of authority and to provide support for grassroots and victims' organizations combating police misconduct. NPAP has over 300 members across the country. The project provides training and support for attorneys and legal workers; public education and information on issues relating to police misconduct; information and resources for non-profit and community groups who work with victims of police abuse; support for legislative reform efforts aimed at raising the level of police accountability; and a forum for legal professionals and community organizations to come together and creatively work to end police misconduct.

One of the important missions of NPAP is to promote the accountability of police officers and their employers for violations of the Constitution or laws of the United States. Police pursuits endanger the lives of the officers involved, as well as the lives of the suspects being pursued, and the public at large. NPAP has a strong interest in assuring that law enforcement agencies authorize high-speed pursuits only when necessary and under constraints that weigh heavily the dangers of such pursuits to all involved against the law enforcement interest that is furthered. The tactics employed by the petitioner in the case before the Court present serious issues of police

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[1] Pursuant to Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

accountability and raise questions about police tactics and practices that are of great importance to NPAP members. *Amicus Curiae* submits this brief to assist the Court in understanding that the conduct of Officer Scott was inconsistent with, and in violation of, the majority of pursuit policies of law enforcement agencies throughout the country. A determination by this Court that Officer Scott's conduct, when viewed at the summary judgment stage in the light most favorable to the respondent, was unreasonable and unconstitutional, will not interfere with, nor be contrary to, the stated policies of most federal, state, and local government law enforcement agencies. Indeed, responsible police officials recognize the dangers inherent in high-speed pursuits and many, like Chief James V. Murray of the Peachtree City Police Department, have called for the adoption of restrictive pursuit policies to put an end to "this high-speed police chase carnage. . . ." (R. 56, Ex. 7).

STATEMENT OF THE CASE

Viewed in the light most favorable to the respondent, a jury could find that petitioner used "deadly force" when he made contact with respondent's vehicle to terminate a high-speed pursuit; that respondent was a non-violent misdemeanant whose underlying offense was speeding (respondent's vehicle was clocked at 73 mph in a 55 mph zone); that there was no probable cause to believe "that respondent had committed a crime involving the infliction or threatened infliction of serious physical harm[;]" and that respondent, "prior to the chase, pose[d] [no] imminent threat of serious physical harm to [petitioner] or others[;]" that there were other means of tracking respondent down (pursuing officers had a description of his vehicle and the license plate number); and that absolutely no warning was given to respondent

that petitioner intended to use deadly force to terminate the pursuit. *Harris v. Coweta County*, 433 F.3d 807, 810, 814, 815 & n.8 (11th Cir. 2005).

A jury could conclude that respondent, while traveling at high rates of speed (between 70 and 90 mph) and violating various traffic laws (respondent passed vehicles on double yellow control lines and ran two red lights), remained in control of his vehicle at all times prior to being rammed by the petitioner's police cruiser, slowed for turns and intersections, and typically used his directional signals. *Id.* at 810. In addition, a jury could find respondent never used his vehicle aggressively against petitioner, pedestrians or other motorists during the course of the pursuit. In fact, the evidence would support a finding that respondent attempted to *avoid* a collision with petitioner's police cruiser in the drug store parking lot. *Id.*

SUMMARY OF ARGUMENT

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that

> [t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

Id. at 11. In reaching this conclusion, the Court took into consideration the fact "that a majority of police departments in this country [had] forbidden the use of

deadly force against nonviolent suspects[,]" observing that "[i]f those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases." *Id.*

Amicus Curiae argues that Scott's conduct in using deadly force to terminate the pursuit of a traffic violator is conduct that is prohibited by the majority of police departments in this country. While the policies surveyed by *Amicus* vary as to when and under what circumstances they authorize the initiation of a high-speed pursuit, *see infra* pp. 5-11, and to the extent and pursuant to what guidelines they authorize the execution of a "PIT" maneuver, *see infra* pp. 11-13 and Appendix A, Survey of Policies: Authorization of PIT Maneuvers, an overwhelming majority of the policies equate "ramming" with the use of deadly force, and prohibit "ramming," "bumping," or contact of any sort to terminate a pursuit at high speeds unless deadly force would be justified. *See infra* pp. 13-21; Appendix B, Survey of Policies: Use of Ramming, Bumping, or Other Vehicular Contact to Terminate Pursuit; and Appendix C, Graphic Chart: Policies Reviewed on Bumping or Ramming.

Amicus is not arguing that law enforcement agencies should never engage in high-speed pursuits or that well-trained officers, given appropriate conditions, should never use a PIT maneuver. Nor is *Amicus* equating conduct that violates police policies with conduct that violates the Constitution. However, to the extent that a determination of excessive force under the Fourth Amendment turns on the objective reasonableness of an officer's conduct, a review of a significant number of pursuit policies of law enforcement agencies should assist the Court in assessing

what practices those in the profession deem reasonable. *Amicus* submits that the Court would not be unduly interfering with sound law enforcement policies throughout the country, but rather would be rendering an opinion consistent with those policies by affirming the Eleventh Circuit's determination that Officer Scott's conduct, assuming the jury found in favor of respondent on the facts alleged and supported by the summary judgment record, constituted an unreasonable seizure of respondent and was conduct a reasonable officer would have understood to be unlawful given the totality of the circumstances confronting him at the time.

ARGUMENT

I. THE MAJORITY OF POLICIES SURVEYED ARE RESTRICTIVE WITH RESPECT TO WHEN PURSUITS MAY BE INITIATED[2]

Review of the local, state, federal, and model pursuit policies posted on www.pursuitwatch.com reveals that pursuit policies nationally reflect concern for the safety of both the officer and the public when an officer initiates a high-speed pursuit of a fleeing suspect. The prevailing theme in each policy is the duty of the officer to make

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[2] *Amicus* reviewed a number of local, state, federal and model pursuit policies from around the country. The sections of the policies reviewed respecting the guidelines for initiating a pursuit are much longer than sections that address PIT maneuvers and "ramming." For this reason, compiling and formatting an appendix containing the relevant language of all the policies reviewed for Part I of this Argument would be burdensome, unwieldy and financially prohibitive. The full text of all policies referenced in the brief are on file in the office of Professor Karen Blum, Counsel of Record for Amicus. In addition, all of the policies referenced in Part I of the Argument may be accessed at http://pursuitwatch.org/pursuit_policies/pursuit_policies_database_project.htm (last visited Jan. 11, 2007).

decisions that best protect the citizenry he or she serves. To that end, each policy mandates that an officer may initiate a high-speed pursuit only after the officer concludes that the risk to the public by not apprehending the suspect outweighs the dangers such a pursuit presents.

The policies surveyed fall within two categories: (1) those policies that allow an officer to initiate a high speed pursuit only when the suspect commits a certain offense; and (2) those policies that allow an officer to initiate a pursuit at his or her discretion without regard for the nature of the underlying offense, typically requiring the police officer to balance the dangers in not apprehending the suspect with the dangers inherent in pursuing the suspect at high speeds.

Policies that permit an officer to initiate a high-speed pursuit when the suspect commits a certain offense vary in the degree of restrictions they place on the officer's decision to pursue. A minority of the policies reviewed allow an officer to initiate a pursuit when the underlying offense is either a non-traffic misdemeanor or a traffic violation.[3] The policy adopted by Cincinnati, Ohio illustrates the position taken by the agencies in this group:

> I. A motor vehicle pursuit is permitted in the following instances:
>
> a. On-sight pursuit of a known or suspected felon.
>
> b. On-sight pursuit of traffic or misdemeanor violations, only if witnessed by the officer or if a warrant is on file.

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[3] *See, e.g.*, Isanti County, MN Pursuit Policy; Hamilton County, OH Pursuit Policy.

Similarly, the policy adopted by the Marion County Sheriff, Indiana, directs that "pursuit driving shall . . . be permitted" upon "sight pursuit of a traffic or misdemeanor violator when the violation has been witnessed by the pursuing member."

In contrast, the majority of the policies surveyed are more restrictive in that they allow an officer to initiate a high-speed pursuit only when the suspect committed a felony or serious crime or where the suspect, if left at large, poses an immediate threat to the public.[4] The Georgia Model Policy exemplifies policies in this category, and it states that

> [p]ursuit is justified only when the officer has reasonable grounds to believe the violator presents a clear and immediate threat to the public; has committed or is attempting to commit a serious felony; or when the need to apprehend the violator outweighs the level of danger created by the pursuit.

Likewise, the St. Louis County Police policy permits an officer to initiate a pursuit only if

> 1. the suspect committed or attempted to commit a felony; and
> 2. the crime involved the **use or threatened used of deadly force** (emphasis in original); and

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[4] *See, e.g.*, Orange County, FL Pursuit Policy; Minneapolis, MN Pursuit Policy; New Jersey Police Vehicular Pursuit Policy; Fairfield, OH Pursuit Policy; Portland, OR Pursuit Policy; Virginia Model Policy (option A: Restrictive); Department of the Treasury Pursuit Policy.

> 3. there is a substantial risk that the fleeing violator will cause death or serious physical injury if apprehension is delayed.

The Florida Highway Patrol policy parallels the Georgia Model Policy and St. Louis County policy because it permits an officer to initiate a pursuit when he or she believes the suspect has "committed or attempted to commit a crime of violence."

Other agency policies permit an officer to initiate a pursuit only if the suspect is believed to have committed a specific felony. For instance, Orlando, Florida's Pursuit Policy directs that an officer may only pursue a suspect who he or she believes committed, or attempted to commit, murder, manslaughter, armed robbery, armed sexual battery, arson to a structure reasonably believed to be occupied, use of explosive devices to a structure reasonably believed to be occupied, kidnapping, armed carjacking, burglary armed with a firearm, aggravated assault on a law enforcement officer with a deadly weapon (not including a motor vehicle), or aggravated battery on a law enforcement officer resulting in serious injury.[5]

Some policies within this group categorically prohibit an officer from initiating pursuit when the suspect committed only a misdemeanor or traffic infraction.[6] For example, the policy adopted by the Daytona Beach Police Department allows an officer to initiate pursuit when the officer has a reasonable belief that the suspect committed a violent or forcible felony crime, but it cautions that

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[5] *See also* Spartanburg, SC Pursuit Policy.

[6] *See, e.g.*, Chandler, AZ Pursuit Policy; Oakland, CA Pursuit Policy; Orlando, FL Pursuit Policy; Hillsborough County, FL Pursuit Policy; Monroe County, FL Pursuit Policy; El Paso, TX Sheriff's Office Pursuit Policy; Virginia Model Policy, (option B: Less Restrictive).

"[o]fficers shall not pursue for any misdemeanor offenses" and "[o]fficers shall not pursue or assist in the pursuit of vehicles for traffic offenses, to include felony traffic violations." Likewise, the Peachtree City, Georgia policy declares that "[o]fficers will not initiate a pursuit when the only crime involved is a minor misdemeanor or a traffic violation."

While the policies discussed above require an officer to identify a certain underlying offense before he or she pursues a suspect, other policies leave the decision to initiate a pursuit to the officer's discretion. Such policies allow an officer to initiate a pursuit when, after an analysis of all the circumstances pertinent to the pursuit, the officer concludes that the risks posed by a high-speed pursuit are outweighed by the danger of not apprehending the suspect.[7] The policy adopted by the Citrus County, Florida Sheriff's Office is one that leaves the decision to pursue to the discretion of the officer. That policy states that

> [t]he authority to initiate emergency operation of an agency vehicle will be at the discretion of the deputy, based upon available information and the deputy's training and experience.

A number of the surveyed polices restrict the officer's discretion by providing explicit factors an officer should consider before he or she initiates a pursuit.[8] Only

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[7] *See, e.g.*, Hawaii Pursuit Policy; Iowa City, IA Pursuit Policy; Kansas City, MO Pursuit Policy; Citrus County, FL Pursuit Policy; Minnesota Police Pursuits Model Policy; Utah Model Pursuit Policy.

[8] For example, the St. Lucie County Sheriff's Office lists a number of factors an officer should analyze when determining whether to initiate a pursuit, including, but not limited to: whether the initiating deputy has probable cause to believe a crime has been or is being committed;

after consideration of these factors, and upon conclusion that the danger to the community should the suspect remain at large outweighs the risks inherent in a high speed pursuit may an officer, in his discretion, initiate a pursuit.

It is also worth noting that some of the policies surveyed limit an officer's discretion to initiate pursuit when the officer identifies the suspect, determines the suspect poses no threat to the public if not apprehended, and determines the suspect may be apprehended at a later time.[9] For example, the Portland, Oregon policy permits an officer to pursue a suspect if the risk created by the suspect's escape outweighs the dangers of pursuit, with the exception that

> [p]ersons whose identities are known, who can be apprehended at a future time, and whose driving or conduct does not create an imminent threat of serious physical injury or death will not be the subject of a pursuit...

In such a situation, the risks to the public are presumed to outweigh the danger of letting the suspect escape.

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seriousness of the originating offense and its relation to community safety; the probability of apprehension; geographic location, population density (vehicle and pedestrian), and land use; time of day; traffic and road conditions; weather conditions; familiarity of deputies and supervisors with the area of the pursuit; speeds involved; and quality of radio communications between pursuing unit(s), the dispatcher, and supervisor.

[9] *See, e.g.*, Lubbock, TX Pursuit Policy.

II. PURSUIT POLICIES THAT ALLOW PIT MANEUVERS COMMONLY RESTRICT THE SPEED AT WHICH THEY MAY BE PERFOMED; EQUATE A PIT MANEUVER PERFORMED AT HIGH SPEEDS WITH DEADLY FORCE; AND REQUIRE OFFICERS WHO PERFORM A PIT MANEUVER TO BE TRAINED IN THE TECHNIQUE

Thirty seven of the pursuit policies surveyed do not absolutely prohibit vehicle contact. Of these policies, only eleven discuss the PIT maneuver. While referenced by several different names (*e.g.*, Pursuit Intervention Technique, Pursuit Immobilization Technique, or Precision Immobilization Technique), the PIT is generally described as an "intentional contact between a police vehicle and a pursued vehicle in such a manner as to cause a 180-degree spin and subsequent stop of the pursued vehicle."[10] Due to the inherent dangers associated with vehicular contact, policies impose several restrictions on the use of the PIT maneuver. Most commonly, only officers who receive PIT maneuver training may perform the technique.[11] Just one

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[10] Portland, Oregon Vehicle Pursuits (7a); *see also* Oakland, California Pursuit Policy (Pursuit Immobilization Technique (P.I.T.) immobilizes a pursued vehicle by causing it to spin and stop by momentarily pushing its rear quarter panel with the corresponding front quarter panel of a police vehicle.) (1a).

[11] *See, e.g.*, Oakland, California Pursuit Policy ("Only members who have received Departmental training in its use may employ the pursuit immobilization technique.") (1a); Marion County, Indiana Pursuit Policy ("Officers not trained by a certified PIT instructor shall not perform the PIT maneuver.") (2a); Plymouth, Minnesota Policy and Operating Procedures (PIT "will only be attempted by officers who have successfully completed department-approved training on its use.") (4a); Minnesota State Patrol Policy (PIT only allowed when "the trooper effecting the vehicular contact has been trained in the pursuit intervention technique which will be employed.") (3a); Las Vegas, Nevada Vehicular Pursuit Policy ("Only commissioned personnel who

policy, the one promulgated by Melbourne, Florida, does not require PIT maneuver training expressly. The policy advises, however, that "[u]nits should not utilize the PIT (Pursuit Intervention Technique) unless deadly force is authorized." (2a).

Unlike the Melbourne, Florida policy, most pursuit policies do not universally qualify the PIT as deadly force, but rather, they place speed restrictions upon its use as non-deadly force. The Portland, Oregon policy illustrates this distinction. It states that the "PIT is not deadly force when employed on an eluding vehicle that is traveling at or below 35 mph. PIT is deadly force when employed on an eluding vehicle that is traveling above 35 mph."[12] While these policies make clear that the use of the PIT at high speeds is tantamount to applying deadly force, other policies completely forbid the use of the PIT at such speeds.[13] Although 35 or 40 mph reflects the preferred speed

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maintain current certification may use this stopping technique.") (5a); Portland, Oregon Vehicle Pursuits ("Only members trained in the [PIT] technique will employ it.") (7a); Waco, Texas General Order (PIT may only be used if the officer has been trained in the use of the technique.) (8a); Whatcom County, Washington, Pursuit Policy ("Deputies must have received training in the utilization of the PIT maneuver before using the technique.") (8a); Madison, Wisconsin, Policy 6-300 (PIT may only be used if "the officer performing the PIT has been trained in the technique.") (9a).

[12] Portland, Oregon Vehicle Pursuits (7a); *see also* Las Vegas, Nevada Vehicular Pursuit Policy ("P.I.T. may be used as non-deadly force to apprehend violators at speeds 40 MPH and below after the violator has clearly demonstrated the intention to avoid arrest.") (5a); Madison, Wisconsin, Policy 6-300 ("Use of the pursuit intervention technique at speeds greater than 35 miles per hour is considered deadly force and shall only be used under authorized deadly force circumstances.") (9a).

[13] *See, e.g.*, Oakland, California, Pursuit Policy ("Under no circumstances shall a pursuit immobilization technique be employed at speeds in excess of 35 m.p.h.") (1a); Reno, Nevada Vehicle Pursuit Policy (PIT should not be attempted when the pursued vehicle is traveling in excess of 35 mph.) (6a).

restriction placed on the use of the PIT by most policies, the Marion County, Indiana policy recommends that the speed not exceed 45 to 50 mph.[14]

As even this limited survey suggests, contemplating any kind of PIT maneuver while traveling at speeds exceeding 50 mph would violate every pursuit policy reviewed. No policy would authorize an officer to use the PIT under the circumstances the petitioner confronted when he sought permission to perform the PIT maneuver on the evening of March 29, 2001. Furthermore, Officer Scott had received no training on the PIT technique. *Harris*, 433 F.3d at 810, 811. His use of the PIT maneuver under these circumstances would violate the requirements of virtually every jurisdiction surveyed.

III. THE MAJORITY OF POLICIES REVIEWED EQUATE RAMMING WITH THE USE OF DEADLY FORCE AND EITHER EXPRESSLY PROHIBIT IT OR LIMIT ITS USE TO SITUATIONS WHERE DEADLY FORCE WOULD BE SANCTIONED

A review of fifty-one local, state, and federal vehicular pursuit policies reveals that most law enforcement agencies disfavor using physical contact by a police vehicle to terminate a pursuit. Policies governing the use of bumping or ramming techniques generally fall within two categories: (1) those that expressly prohibit deliberate vehicular contact to terminate a pursuit; (2) and those that limit deliberate contact to situations in which deadly force is both appropriate and authorized by the department's deadly force policy.

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[14] Marion County, Indiana ("It is recommended the PIT only be used at a speed not exceeding 45 to 50 miles per hour.") (2a).

Most of the municipal police department policies reviewed expressly prohibit officers from bumping or ramming a fleeing vehicle to force the pursued driver to slow or stop his or her vehicle. The St. Louis County, Missouri Police pursuit policy typifies policies that strictly prohibit bumping or ramming as a means of terminating vehicular pursuits. The policy asserts that "[d]eliberate contact by a police vehicle with the pursued vehicle from the front, rear or side is not authorized . . . at any time during a pursuit as a method to stop the vehicle." (12b). Likewise, the Kansas City, Missouri Police Department's Pursuits and Emergency Police Vehicle Operations policy states that "[t]he use of push bars is prohibited," and that "[p]olice vehicles will not be used to ram pursued vehicles." (11b). The pursuit policy of the City of Cincinnati, Ohio is equally emphatic in prohibiting the use of a "police vehicle as a battering ram to force the vehicle being pursued to stop." (14b). In addition to listing bumping or ramming as a generally prohibited practice under their respective pursuit policies, the Monroe County, Florida Police Department (5b) and Potter County, Texas Sheriff's Department (17b) were careful to stress that intentional vehicular contact is prohibited when utilized in the specific manner employed by Officer Scott: to "forc[e] the pursued vehicle into parked cars, ditches, or any other obstacle . . . to force the vehicle to a stop."[15]

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[15] *See also* The Chandler, Arizona Police Department Pursuit Policy ("Officers may not stop or attempt to stop a moving suspect vehicle during a pursuit by striking the suspect's vehicle with the police vehicle. Possible activation of air bags and/or loss of vehicle control prohibit this action.") (2b); Oakland, California Police Department Pursuit Policy ("Channelization, boxing in, and [PIT] are the only methods approved for stopping suspects' vehicles. Other methods, e.g., ramming, shall not be used.") (2b); Hillsborough County, Florida Sheriff's Department Pursuit Policy ("Deputies shall not intentionally ram a suspect's vehicle.") (4b); Volusia County, Florida Sheriff's Office Motor Vehicle Apprehension Policy ("While pursuing, deputies

Among municipal policies that do not bar deliberate offensive contact outright, the majority of policies state implicitly or explicitly that ramming constitutes deadly force and is subject to all applicable restrictions governing the use of deadly force to apprehend fleeing suspects. The policy promulgated by the College Park, Georgia Police Department exemplifies policies that allow a pursuing officer to ram a fleeing vehicle intentionally within the specific factual context of deadly force situations. (6b). According to the policy,

> [t]he department allows vehicle contact actions or other forcible stop techniques to terminate a pursuit only when all of the following conditions have been satisfied: there is sufficient legal justification for the use of deadly force; a supervisor has authorized such action, if feasible; and [the officer] has been properly trained in the application of the selected technique.

Similarly, the Fredericksburg, Virginia Department of Police's pursuit policy indicates that "[f]orcible measures to stop a fleeing driver are prohibited except where deadly force is appropriate," and that police department vehicles "shall not be used to perform a forcible stop except . . . when a use of deadly force is necessary and authorized."

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shall not ram . . . a fleeing vehicle.") (6b); Rochester, New Hampshire Police Department Pursuit Policy ("The forcible stopping of any vehicle through vehicular contact is prohibited.") (13b); Hamilton County, Ohio Sheriff's Department Emergency Operations of Sheriff's Office Vehicles Policy ("Officers will make no attempt to stop pursued vehicles by. . . ramming. . . during the pursuit.") (14b); The Colony, Texas Police Department Pursuit Policy ("Ramming is strictly prohibited.") (17b).

(19b). Police departments in major metropolitan areas across the country have also placed intentional vehicular contact within the context of deadly force in their respective pursuit policies, including Orlando, Florida Police Department ("Units may not ram a fleeing vehicle unless deadly force is authorized.") (5b), Minneapolis, Minnesota Police Department ("Vehicle contact . . . may only be used when state law permits use of deadly force.") (11b), Las Vegas, Nevada Police Department ("The use of a vehicle to stop or apprehend a suspect, such as ramming . . . may be considered deadly force.") (12b), and Portland, Oregon Police Department ("Using a police vehicle to purposely cause contact with another moving vehicle in order to bring that vehicle to a stop . . . is . . . deadly physical force.") (15b). In addition to characterizing ramming as deadly force, several of the pursuit policies reviewed, including those of the Citrus County, Florida Sheriff's Office (3b), the Iowa City, Iowa Police Department (8b), and the City of Mankato, Minnesota Department of Public Safety (10b) emphasized that "ramming will only be considered to stop a fleeing vehicle as a last resort, when all other reasonable means to stop the violator have failed."[16]

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[16] *See also* The Daytona Beach, Florida Police Department Vehicle Pursuit Policy ("While pursuing, officers shall not ram. . . unless specifically authorized by a command level officer.") (4b); St. Lucie County, Florida Sheriff's Office Vehicle Pursuit Policy ("Deputy(s) are discouraged from ramming . . . fleeing suspect(s). These methods should be considered deadly force and will be fully explained by the pursuing deputy at the termination of the pursuit.") (6b); Plymouth, Minnesota Police Department Pursuit Policy ("Vehicle contact may be used only when in accordance with the department procedure on use of force and when state law permits the use of deadly force.") (11b); Reno, Nevada Police Department Vehicle Pursuit Policy ("Surrounding a suspect vehicle, as well as forcing vehicles off the road, are . . . extremely hazardous tactics and should be used only as a last resort when necessary to protect an officer or others from an immediate threat of death or serious physical injury, or to prevent a crime where the

suspect's actions place persons in immediate jeopardy of death or serious physical injury") (12b); Fairfield, Ohio Police Department Pursuit Policy ("Ramming may be utilized when: deadly force is authorized; all other efforts to effect apprehension have failed; and the shift supervisor has authorized the use of . . . ramming.") (14b); Beaverton, Oregon Police Department Vehicular Pursuit Policy ("Unless specifically authorized by a supervisor, pursuing officers will not . . . ram [or] force off the road . . . the suspect vehicle. Such action may be approved only when the use of deadly force is authorized.") (15b); Spartanburg, South Carolina Public Safety Department Pursuit Policy ("In the course of the pursuit, deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches, or any other obstacle . . . shall be prohibited unless such actions are specifically authorized by the supervisor. Such actions may be approved only when the use of deadly force would be authorized.") (15b); Rapid City, South Dakota Police Department Vehicle Pursuits Policy ("Deliberate physical contact between vehicles will not be justified, except . . . [w]hen officers are in pursuit of known and extremely dangerous felons who, if allowed to escape, would create a substantial risk of another person being killed or seriously injured, or [e]xcept under orders of a supervisor.") (16b); El Paso County, Texas Sheriff's Office Vehicle Pursuit Policy ("Deputies will not use. . . ramming. . . methods unless deadly force is deemed necessary.") (16b); Lubbock, Texas Police Department Emergency Driving Policy ("The following measures shall be taken ONLY when established departmental policy would allow the use of deadly force: Intentional striking or ramming of the suspect's vehicle by any portion of the police vehicle.") (17b); Waco, Texas Police Department Emergency Vehicle Operations Policy ("A suspect posing a deadly force threat may be immobilized using a police vehicle.") (17b); Des Moines, Washington Police Department Pursuit Policy ("An automobile used to force a vehicle off the road. . . is considered deadly force.") (19b); City of Racine, Wisconsin Police Department Pursuit Policy ("In the course of a pursuit, deliberate offensive contact between vehicles or forcing the pursued vehicle off the roadway, into parked cars, ditches or any other obstacle . . . ramming . . . is prohibited, unless the use of deadly force is authorized.") (20b).

It is worthwhile noting that the policy promulgated by Whatcom County, Washington Sheriff's Office, in addition to classifying intentional intervention (*i.e.*, ramming) as a use of deadly force, discusses the myriad dangers inherent in the use of such techniques, such as "the possibility of airbag deployment and potential

State and federal government policies that address methods for terminating vehicular pursuits are consistent in disapproving of bumping or ramming by pursuing police vehicles. Like several of the municipal pursuit policies reviewed, Virginia's model pursuit policy expressly prohibits the use of bumping or ramming in vehicular pursuits: "[o]fficers shall not intentionally ram, bump, or collide with a fleeing vehicle nor shall officers pull alongside such vehicles in an attempt to force them off the road or into an obstacle." (19b). Similarly, the Florida Highway Patrol Use of Vehicles in Patrol/Pursuits policy states unequivocally that "[i]n the course of a pursuit, deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches or any other obstacle . . . [and] ramming [are] prohibited."[17] (4b).

The majority of pursuit policies promulgated by the States do not, however, prohibit intentional vehicular contact. Instead, they limit such contact to situations that warrant deadly force. For example, the Utah Vehicle

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for injury to suspects and deputies." (20b) The pursuit policy of the City of Streetsboro, Ohio Police Department likewise expresses grave concern over "the extreme danger to the officers, occupants of other vehicles, and other users of the high way" when ramming is employed to terminate a pursuit and bring the pursued vehicle to a stop. (14b).

[17] *See also* The Hawaii Police Department Motor Vehicle Pursuit Policy ("Ramming . . . is prohibited in pursuit situations.") (7b); State of Connecticut Uniform Pursuit Policy ("All intervention techniques short of deadly force shall be used when it is possible to do so in safety police officers utilizing them have received appropriate training in their use.") (3b). The International Association of Chiefs of Police (IACP) has also weighed in on the use of intentional vehicular contact as a means of terminating a pursuit. The IACP Sample Policy, while not directly equating bumping or ramming with a use of deadly force, limits "tactical intervention techniques" to low speeds and states clearly that such techniques should be used only "when it is possible to do so in safety and when the officers utilizing them have received appropriate training in their use." (1b).

Pursuit Model Policy provides that "[t]he use of forcible stops such as . . . ramming [is] a last resort measure and should be used only when the use of deadly force is justified." (18b). The Utah Model Policy stresses that ramming is appropriate only "[a]fter all reasonable alternative means of apprehension have been considered and rejected as impractical." (18b). The Minnesota State Patrol pursuit policy makes clear that "[t]he deliberate striking (ramming) of a pursued vehicle with a state unit at speeds greater than allowed for use of a Pursuit Intervention Technique (PIT) shall be considered deadly force . . . ." (9b). The policy states further that "[t]roopers may employ the Pursuit Intervention Technique (PIT) against a pursued vehicle . . . only at speeds of 40 mph or less on straight roadways or 25 mph or less in cornering situations." (9b). The Indiana State Police Pursuit/ Emergency Driving and Roadblocks Policy even goes so far as to state that "[u]sing a police vehicle as a weapon shall be viewed with the same regard as using a deadly weapon."[18] (8b). Georgia's model pursuit policy provides that "[a]n officer will not bump or ram a pursued vehicle, unless otherwise ordered to do so by the field supervisor." (7b).

The Department of the Treasury's pursuit policy is consistent with the majority of policies promulgated by the States and provides that "[m]aking deliberate contact between vehicles, forcing the pursued vehicle off the roadway, ramming, or using other offensive maneuvers

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[18] *See also* The Minnesota Police Pursuits Model Policy ("No officer will intentionally make vehicle-to-vehicle contact unless in conformance with agency policy on use of force.") (9b); New Jersey Police Vehicular Pursuit Policy ("Officers involved in a pursuit shall not. . . engage in any vehicle contact action except as a last resort to prevent imminent death or serious injury to the officer or another person where deadly force would otherwise be justified.") (13b).

while the pursued vehicle is in motion is strongly discouraged. Such offensive tactics are considered as deadly force . . . ." (1b)

Unlike the vast majority of municipal, state, and federal vehicular pursuit policies reviewed by *Amicus*, the Coweta County policy in effect on March 29, 2001, was permissive. Coweta County's pursuit policy stated simply that "[d]eliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Rather than prohibiting or limiting the use of such techniques to deadly force situations, the Coweta County policy granted officers nearly unfettered discretion to bump or ram fleeing vehicles to terminate a pursuit, subject only to minimal supervisory approval. Following the events that precipitated this suit, Coweta County officials revised their pursuit policy. The County's current policy, which now aligns closely with the majority of policies reviewed by *Amicus*, provides that "[i]n the course of any pursuit, deliberate contact between vehicles, ramming or forcing pursued vehicles into parked cars, other vehicles or fixed objects is prohibited unless such actions are authorized by the on duty supervisor." The policy mandates that "[n]o officer shall fire at or intentionally ram the fleeing vehicle unless deadly force is justified against all occupants of the vehicle." In short, Coweta County, like the majority of police departments surveyed, now restricts the use of ramming or bumping to situations where deadly force would be authorized under the factors set forth in *Garner* or under even more restrictive conditions that may be set out in the department's deadly force policy.[19]

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[19] As the Solicitor General's amicus brief notes, the DOJ's deadly force policy is even more restrictive than *Garner*. Brief for the United States as Amicus Curiae Supporting Petitioner, Scott v. Harris, 127 S. Ct. 468 (Dec. 15, 2006) (No. 05-1631), 2006 WL 3707883, *15 n.4.

CONCLUSION

Over twenty years ago, the Police Foundation, joined by nine national and international associations of police, the chiefs of police associations of two states, and thirty-one law enforcement chief executives, submitted an *amicus* brief to this Court on behalf of the respondent in *Tennessee v. Garner*. Brief for Police Foundation et al. as Amici Curiae in Support of the Respondent-Appellee, Tennessee v. Garner, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070), 1984 WL 566025. In that brief, *Amici* noted that "[t]he primary police responsibility of protecting life and enforcing law is best served by reducing use of deadly force to an absolute minimum by providing meaningful guidelines for officer discretion." 1984 WL 566025, at *23. The brief urged the Court to set constitutional limits on the use of deadly force in the apprehension of non-dangerous, fleeing felons. *Amici* in that case assured the Court that setting such limits and restrictions would be "consistent with most police department policies and practices and [would] not unduly intrude on criminal law enforcement." *Id.* at 27-40. In the conclusion of their brief, *Amici* referenced language, *see id.* at *47, *48, from the dissenting opinion of then Chief Justice Burger in *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting). The language is strikingly relevant to the case now before the Court:

> From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in

> common with all rational minds, would say hat the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

Id.

Amicus Curiae acknowledges "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). However, on March 29, 2001, Officer Scott was not faced with such uncertainty about the amount of force that was appropriate in seizing a fleeing traffic violator. Along with the guidelines on the use of deadly force established by the Court in *Garner* and *Graham*, the majority of police pursuit policies in the country would have prohibited the ramming of respondent's vehicle as a means of terminating a pursuit, where the suspect's only offense prior to the pursuit was a speeding violation and the suspect presented no imminent danger to the officer or the public at the time the deadly force was used. We urge the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

KAREN BLUM*[20]
SUFFOLK UNIVERSITY
LAW SCHOOL
120 Tremont Street
Boston, MA 02108
(617) 573-8216
* *Counsel of Record*

HOWARD FRIEDMAN
MYONG J. JOUN
NATIONAL POLICE
ACCOUNTABILITY PROJECT
14 Beacon Street, Suite 701
Boston, MA 02108
(617) 227-6015

Attorneys for Amicus Curiae

Dated: January 17, 2007

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[20] Counsel acknowledges the assistance of the following Suffolk University Law School students in the research and writing of this brief: Zachary Hillman, Michael Lane, and Gregory Tumolo.

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APPENDIX A: PIT MANEUVERS

CALIFORNIA

Oakland, California Police Department
Effective April 18, 2000
EMERGENCY DRIVING, PURSUIT (CODE 3), PURSUIT INTERVENTION, & SAFETY BELT REGULATIONS
III. DEFINITIONS
3. Pursuit Immobilization Technique (P.I.T.) immobilizes a pursued vehicle by causing it to spin and stop by momentarily pushing its rear quarter panel with the corresponding front quarter panel of a police vehicle. See Attachment C.
V. GENERAL PROVISIONS GOVERNING IMMEDIATE PURSUIT DRIVING AND THE USE OF PURSUIT INTERVENTION MANEUVERS
D. Pursuit Intervention Maneuvers
3. Pursuit Immobilization Technique (P.I.T.) (See Attachment C)
a. Under no circumstances shall a pursuit immobilization technique be employed at speeds in excess of 35 m.p.h.

b. Only member who have received Departmental training in its use may employ the pursuit immobilization technique.

c. Occupants of police vehicles employing the technique shall wear seat belts.

d. When authorizing the use of the pursuit immobilization technique, supervisors and command officers shall authorize three (3) units to participate in the pursuit. One unit shall be designated to use the technique. The other two units shall be assigned to conduct a high-risk car stop on the suspect vehicle following its immobilization.

FLORIDA

Melbourne, Florida Police Department
MELBOURNE POLICE DEPARTMENT GENERAL ORDERS
POLICY AND PROCEDURE DIRECTIVE
TITLE: VEHICULAR PURSUITS MPD POLICY #: H.702
Effective July 1, 2000

14. Units should not utilize the PIT (Pursuit Intervention Technique) unless deadly force is authorized (F.S. 776.06).

INDIANA

Marion County, Indiana
.80 P.I.T. Maneuver (PIT)

The Precision Immobilization Technique (PIT) will be used in order to stop a pursuit at the safest, fastest, and most appropriate opportunity before the pursuit places civilians in danger. If officer(s) trained in performing the PIT maneuver determines the vehicle must be stopped to safeguard life and preserve the public safety, the PIT may be used.

Officers not trained by a certified PIT instructor shall not perform the PIT maneuver.
It is recommended the PIT only be used at a speed not exceeding 45 to 50 miles per hour.

MINNESOTA

Minnesota State Patrol
Effective April 1, 2001
III. Definitions
I. Pursuit Intervention Technique (PIT)
Pursuit Intervention Technique, hereafter known as PIT, is a controlled contact between the patrol unit and the pursued vehicle at low speeds which is intended to cause the operator of a pursued vehicle to lose control and the vehicle become disabled.
IV. Pursuit Guidelines
J: Pursuit Tactics

1: The deliberate striking (ramming) of a pursued vehicle with a state unit at speeds greater than allowed for use of a Pursuit Intervention Technique (PIT) shall be considered deadly force and is justified by troopers only when necessary ...

2: Troopers may employ the Pursuit Intervention Technique (PIT) against a pursued vehicle in order to terminate a pursuit and [sic] prevent a pursued vehicle from continued operation under the following circumstances:

A: when all other means of apprehension have been considered and rejected as impractical;

B: only at speeds of 40 MPH or less on straight roadways or 25 MPH or less in cornering situations;

C: when the risk of harm to people of a continued pursuit outweighs the risk of harm to people from an intentional low speed vehicular collision; and

D: the trooper effecting the vehicular contact has been trained in the pursuit intervention technique which will be employed.

Plymouth, Minnesota Police Department
POLICY AND OPERATING PROCEDURE MANUAL
Effective August 28, 1996
Revised January 11, 2005
VEHICLE PURSUIT

X. Pursuit Tactics:

A: Vehicle Contact:

1. Vehicle contact may be used only when in conformance with the Department Procedure on Use of Force and when state law permits the use of deadly force, unless the officer believes contact is necessary because the risk of personal injury, created by the continued pursuit, is greater than the risk of injury from the proposed action. Factors to consider when assessing risks include the number and location of potential victims, the speed of the pursued vehicle, traffic conditions, the suspect's driving conduct, and the length of the pursuit.

3. The Safest and most effective use of vehicle contact is through the use of the Pursuit Intervention Technique (PIT.) PIT should be attempted at reasonable speeds based on evaluation of the circumstances of the pursuit and will only be attempted by officers who have successfully completed department-approved training on its use. Officers must consider the safety of the public, his/her own safety, and the safety of the violator in determining whether the technique will be attempted. The PIT maneuver should not be attempted on a vehicle pulling a trailer, a motorcycle, or a bus unless deadly force is authorized.

4. Factors to consider when using vehicle contact include speed, location, topography, road conditions, obstructions, and the position of other vehicles, passengers, and pedestrians.

NEVADA

Las Vegas, Nevada Police Department
VEHICULAR PURSUIT
USE OF THE PURSUIT IMMOBILIZATION TECHNIQUE (P.I.T.)
Without the willful compliance of the fleeing suspects to voluntarily brining their vehicle to a stop, circumstances develop which may warrant a forcible stop. Primary and secondary units will exhaust all other means of apprehension before attempting forcible stops and will use only the minimal amount of force which is consistent with the accomplishment of the mission. The use of a vehicle to stop or apprehend a suspect, such as ramming or the use of P.I.T. may be considered a use of deadly force.
Officers will be trained on the Pursuit Immobilization Technique and when its use is permissible. Only commissioned personnel who maintain current certification may use this stopping technique. P.I.T. will not be used to stop [sic] a vehicle with deflated tired unless deadly force is authorized.
P.I.T. as Deadly Force:
Circumstances warranting the use of P.I.T. as deadly force are as follows:
1: the officer believes that continued movement of the pursued vehicle would place others in danger of bodily harm or death.
2: Apparent risk of harm, to other than the occupants of the pursued vehicle, is so great as to outweigh the risk of harm in making the forcible stop.
3: All other means of apprehension have been considered and rejected as impractical, e.g., continue to follow, call for air support.
P.I.T. as Non-deadly Force:

P.I.T. may be used as non-deadly force to apprehend violators at speeds 40 MPH and below after the violator has clearly demonstrated the intention to avoid arrest.

Locations and Hazards

Officers will consider the safety of the public and suspects before executing this technique, evaluating the following locations and hazards:

1. Areas with high concentrations of pedestrians
2. Other vehicle traffic
3. Parked vehicles
4. Telephone/utility poles
5. Bridges
6. Areas adjacent to paved roads with a large elevation change
7. High center of gravity vehicles, such as vans, SUVs, and jeeps, likely to roll over (4/05, 9/05)

Reno, Nevada Police Department

Effective: January 3, 2006

VEHICLE PURSUITS

Vehicle Intervention Techniques

Pursuit Intervention Technique (PIT) – The PIT is designed to be executed by a pursuing police vehicle. The PIT is a technique in which the officer's vehicle makes contact with the rear quarter panel of the suspect's vehicle, causing it to rotate and come to a stop. If the technique is properly executed, damage to the officer's vehicle should be minor or negligible. The location chosen to implement a PIT is of paramount importance. The area should be clear of pedestrians and other occupied vehicles, and roads should be in good condition, e.g., free from loose gravel, significant road repair, etc. Unless exigent circumstances exist, the PIT should **not** be attempted when the following exists:

- The pursued vehicle is traveling in excess of 35 mph.

- The size of the pursued vehicle is significantly heavier than the primary unit's police car, e.g., bus, motor home, semi-truck, dual-rear-wheel pickup truck, etc.
- The pursued vehicle is transporting hazardous material.
- Since employing the PIT will cause officers to be in close proximity to the suspect, a PIT should not be used on a suspect who is known to be armed.
- The pursued vehicle is a motorcycle, motor scooter, or three-wheeled cycle.

OREGON

Portland, Oregon
630.05 **VEHICLE PURSUITS**
Pursuit Intervention Strategies (630.05)
c. Pursuit Intervention Technique (PIT): Intentional contact between a police vehicle and a pursued vehicle in such a manner as to cause a 180-degree spin and subsequent stop of the pursued vehicle. Only members trained in the technique will employ it. PIT may be used to end a pursuit when other means have been considered and tried or ruled out. PIT will not be used on two-wheeled vehicles, passenger-occupied buses, vehicles transporting hazardous material or any vehicle that would pose an unusual hazard to innocent parties. PIT is not deadly force when employed on an eluding vehicle that is traveling at or below 35 mph. PIT is deadly force when employed on an eluding vehicle that is traveling above 35 mph.

TEXAS

Waco, Texas
Waco Police Department
General Order
31.03.3 Vehicular Pursuits
L. Use of Force:
3. Vehicular forcible stopping techniques (often referred to as: Ramming, Roadblocks, Moving Roadblocks, PIT Maneuver, etc.) used to end/immobilize a pursuit or potential deadly force threat, may be used if all of the following conditions are met:
a. The officer has been trained in the use of the technique they intend to deploy;
b. The officer is justified in using deadly force against a suspect inside the motor vehicle; and
b. A supervisor must have approved the use of one of the techniques listed above (prior to its use) unless the officer had no time to obtain supervisory approval prior to the use of the technique.

WASHINGTON

Whatcom County, Washington Sheriff's Office
Effective October 1, 2004
Pursuit of Motor Vehicles:
23.5.4 Pursuit Immobilization Technique (PIT)
The PIT is a method to reduce the risks in bringing pursuits to a conclusion. PIT is a forced rotational vehicle stop of a non-compliant suspect in an effort to end the suspect's flight. Deputies must have received training in the utilization of the PIT maneuver before using the technique. Until deputies are trained in PIT, assistance from other agencies with PIT trained officers (WSP) may be requested.

WISCONSIN

Madison, Wisconsin Police Department
Policy 6-300
Pursuit Intervention Technique (PIT)

1. The pursuit intervention technique may be used under circumstances involving a type 1 pursuit if:

a. The suspect's vehicle is traveling less than 35 miles per hour

b. Doing so would not create and unreasonable risk of harm to uninvolved motorists or pedestrians

c. A supervisor has approved of using the technique, unless it is unsafe or impracticable to do so.

d. The officer performing the PIT has been trained in the technique.

APPENDIX B: RAMMING, BUMPING, CONTACT

FEDERAL

Department of the Treasury
Subject: PURSUIT POLICY
DATE: 06/22/94...
6. GUIDELINES. ...
e. Pursuit Tactics.
(1) Offensive Tactics. Making deliberate contact between vehicles, forcing the pursued vehicle off the roadway, ramming, or using other offensive maneuvers while the pursued vehicle is in motion is strongly discouraged. Such offensive tactics are considered as deadly force and are justified only under the following circumstances:
- Use of offensive tactics are authorized by agency regulations/general orders.
- Danger to the public makes it imperative that the suspect be apprehended, justifying the use of deadly force.
- Notification is given to the supervisor if agency policy requires and time permits.
- Pursuing officer should be trained in the offensive tactics selected to terminate the pursuit, and all cautions should be exercised to minimize danger to the public, police officers, and suspect(s).

OTHER

International Association of Chiefs of Police Sample Policy
Effective Date: October 30, 1996
Subject: Vehicular Pursuit
Reevaluation Date: October 30, 1999 ...
IV. PROCEDURES:...
D. Pursuit Tactics:...

4. All intervention tactics short of deadly force such as spike strips, low speed tactical intervention techniques, and low speed channeling (with appropriate advance warning) should be used when it is possible to do so in safety and when the officers utilizing them have received appropriate training in their use.

STATE AND MUNICIPAL

ARIZONA

Chandler Police Department
Effective 07/01/96
600 GENERAL PROVISIONS
The following policies will govern vehicular pursuits:
A. Pursuit Vehicle Responsibilities ...
5. Ramming – Officers may not stop or attempt to stop a moving suspect vehicle during a pursuit by striking the suspect's vehicle with the police vehicle. Possible activation of air bags and/or loss of vehicle control prohibit this action.

CALIFORNIA

Oakland Police
DEPARTMENTAL GENERAL ORDER
Rev. 18 Apr 00
V. GENERAL PROVISIONS GOVERNING IMMEDIATE PURSUIT DRIVING AND THE USE OF PURSUIT INTERVENTION MANEUVERS ...
E. Channelization, Boxing In, and the Pursuit Immobilization Technique are the only methods approved for stopping suspects' vehicles. Other methods (e.g., "ramming," "roadblocks," et cetera) shall not be used.

CONNECTICUT

State of Connecticut Uniform Pursuit Policy
8/10/03
Section14-283a-4. PROCEDURES ...
(4) All intervention techniques short of deadly force shall be used when it is possible to do so in safety police officers utilizing them have received appropriate training in their use. Such techniques shall include boxing in the vehicle or using controlled termination devices.

FLORIDA

Citrus County Sheriff's Office
EFF. DATE 5-15-01
X. INTERVENTION...
C. A supervisor may authorize the use of "ramming" as a last resort when all other reasonable means to stop the violator have failed. Also, the member must reasonably believe the violator has committed, has attempted to commit, or is attempting to commit a felony that involved the use, or threatened use, of deadly force and there is substantial risk that the violator will cause death or serious physical injuries to others if apprehension is delayed. Caution must be used to assure the ramming does not jeopardize other persons or property. Members pursuing a motorcycle will not use ramming as a means to stop the violator. Ramming a vehicle should be considered deadly force.

Daytona Beach Police Department
TITLE: VEHICLE PURSUITS ...
DATE OF ISSUE: 05-01-2000
EFFECTIVE DATE: 05-01-2000 POLICY ...
PROHIBITED PURSUIT ACTIONS...
51.1.44 While pursuing, officers shall not ram or conduct rolling roadblocks unless specifically authorized by a command level officer. Additionally, the discharge of firearms at moving vehicles is prohibited unless the use of deadly force is in accordance with appropriate departmental directives if, based on the supervisors or officer judgment, the danger to the officers involved and the general public outweighs the need to stop the fleeing vehicle.

Florida Highway Patrol
SUBJECT: USE OF VEHICLES IN PATROL/PURSUITS
ISSUE DATE: 02/01/96
EFFECTIVE DATE: 02/01/96
17.05.05 PROCEDURES ...
H. PURSUIT OPERATIONS, TACTICS, AND PROHIBITIONS
Members shall comply with the following provisions:
1. OFFENSIVE TACTICS - In the course of pursuit, deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches or any other obstacle, boxing in, heading off, ramming, rolling roadblocks, or driving alongside the pursued vehicle while it is in motion is prohibited.

Hillsborough County Sheriff's Department
STANDARD OPERATING PROCEDURE
Date: 12/14/93; Revised: 07/16/01
VIII. CONDUCT OF THE PURSUIT:...
D. Other Methods Used to Apprehend Moving Vehicles...
5. Ramming - Deputies shall not intentionally ram a suspect's vehicle. This method is considered DEADLY

FORCE and should not be used because of airbags and mechanical kill switches which may be activated upon impact.

Melbourne Police Department
TITLE: VEHICULAR PURSUITS ...
EFFECTIVE DATE: 07/01/00
POLICY H.702.3 While In Pursuit...
14. Units should not utilize the PIT (Pursuit Intervention Technique) unless deadly force is authorized (F.S. 776.06). Approval from a command officer should also be obtained, unless the use of such force is immediately necessary to protect human life from death or great bodily harm.

Monroe County
4) Emergency Vehicle Operation, Tactics, and Prohibitions- Members shall comply with the following provisions:
a) Offensive tactics - In the course of pursuit, deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches or any other obstacle, boxing in, heading off, ramming, running roadblocks or driving alongside the pursue vehicle while it is in motion is prohibited.

Orlando Police Department
POLICY AND PROCEDURE OP-68, VEHICLE PURSUITS
EFFECTIVE: 3/08/04...
2.1.2 WHILE IN PURSUIT
The following tactics and conditions will be adhered to while engaged in a pursuit: (17.07b,c)...
m. Units may not ram a fleeing vehicle unless deadly force is authorized. Approval from a watch commander must also be obtained, unless the use of such force is immediately

necessary to protect human life from death or great bodily harm. (17.07f,g)

St. Lucie County Sheriff's Office
Effective: April 1, 2002
Title: Motor Vehicle Pursuits ...
XII. FORCIBLE STOPPING OF VEHICLE: ...
B. If it is reasonably believed that a delay in the apprehension of the pursued suspect represents an impending threat of grave injury or death to any person, the deputies involved might have to resort to the following methods:...
2. Ramming or Boxing-in: Deputy(s) are discouraged from ramming or boxing-in fleeing suspect(s). These methods should be considered deadly force and will be fully explained by the pursuing deputy at the termination of the pursuit.

Volusia County Sheriff's Office
TITLE: MOTOR VEHICLE APPREHENSION
EFFECTIVE: 10-2001
CONDUCTING THE PURSUIT...
PROHIBITED DRIVING...
41.2.45 While pursuing, Deputies shall not ram, conduct rolling roadblocks or discharge firearms at a fleeing vehicle.

GEORGIA

College Park Police Department
40.5 Pursuing Fleeing Suspects...
40.5.4 Pursuit Tactics
Forcible Stop Techniques - The department allows vehicle contact actions or other forcible stop techniques to terminate a pursuit only when all of the following conditions have been satisfied:

- there is sufficient legal justification for the use of deadly force; and
- a supervisor has authorized such action if feasible; and
- you have been properly trained in the application of the selected technique.

Georgia Model Pursuit Policy
8/23/03
S.O.P. 12-2 VEHICLE PURSUIT ACTIONS
PROHIBITED PRACTICES...
5. An officer will not bump or ram a pursued vehicle, unless otherwise ordered to do so by the field supervisor.

Peachtree City Police Department
SUBJECT: Vehicle Pursuit Actions
DATE: 10-23-01
IV. PROCEDURE
G. RESPONSIBILITIES OF SUPERVISOR...
4. The Watch Commander will be the only one who, with adequate justification may authorize:...
b. The boxing in, heading off, or ramming of a pursued vehicle.

HAWAII

Hawaii Police Department
MOTOR VEHICLE PURSUIT
Revised: 05-13-91 ...
IV. RESTRICTIONS...
D. Ramming, boxing-in or blocking the roadway with police vehicles is prohibited in pursuit situations.

INDIANA

Indiana State Police
Subject: Pursuit/Emergency Driving and Roadblocks
Effective Date: July 25, 2001...
III. PROCEDURE...
L. The Use of Deadly Force policy, stated in the Department regulations, shall be a primary consideration governing pursuits and subsequent roadblocks....
2. Using a police vehicle as a weapon shall be viewed with the same regard as using a deadly weapon. Such use shall be considered only as a last resort when the officer reasonably believes the officer must use such force to prevent imminent serious bodily injury to the officer or a third person.

IOWA

Iowa City Police Department
POLICE VEHICLE PURSUITS
Date of Issue: February 10, 1999
Effective Date: March 1, 1999
IV. PROCEDURES...
F. Pursuit Tactics ...
7. Ramming will only be considered to stop a fleeing vehicle as a last resort, and then only in those extreme cases where the use of deadly force is justified to prevent injury or death to the officer or other persons. The officer must consider the extreme danger to himself/herself, occupants of other vehicles and other users of the roadway. Permission to make deliberate contact with the offender's fleeing vehicle will be received from the supervisor prior to initiation of the act.

MINNESOTA

Minnesota Police Pursuits Model Policy
PB Rev: 5/03
III. PROCEDURE ...
C. Responsibilities of the Primary Unit ...
3. No officer will intentionally make vehicle-to-vehicle contact unless in conformance with agency policy on use of force (see agency policy on use of force).

Minnesota State Patrol
Effective Date: April 1, 2001
Subject: Pursuit...
IV. Pursuit Guidelines...
J. Pursuit Tactics
1. The deliberate striking (ramming) of a pursued vehicle with a state unit at speeds greater than allowed for use of a Pursuit Intervention Technique (PIT) shall be considered deadly force and is justified by troopers only when necessary:
a. to protect themselves or another from apparent death or great bodily harm;
b. to effect the arrest or capture, or prevent the escape of a person whom the trooper knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force; or
c. to effect the arrest or capture, or prevent the escape of a person when the trooper knows or has reasonable grounds to believe has committed or attempted to commit a felony if the trooper reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.
2. Troopers may employ the Pursuit Intervention Technique (PIT) against a pursued vehicle in order to terminate a pursuit c prevent a pursued vehicle from continued operation under the following circumstances:

a. when all other means of apprehension have been considered and rejected as impractical;
b. only at speeds of 40 mph or less on straight roadways or 25 mph or less in cornering situations; ...

Isanti Police Department
TITLE: Pursuit Policy
DATE EFFECTIVE: Supersedes all previous Pursuit Policies
USE OF AFFIRMATIVE METHODS
"Affirmative methods" are those measures which are intended to bring about an end to the pursuit when a fleeing violator's actions are posing an unreasonable risk of death or great bodily harm to others. Whenever affirmative methods are used, reasonable measures shall be taken to safeguard the lives of innocent persons not involved in the pursuit.
Examples of affirmative methods are as follows: ...
3. Ramming - Ramming the fleeing vehicle is not permitted unless the officer is currently trained in pursuit intervention tactics.

City of Mankato Department of Public Safety
Date: 10-02-1989
Revision: 07-22-1992
Pursuit/Emergency Vehicle Operation 3-165.005
PROCEDURE FOR PURSUIT:
F. The deliberate striking, ramming, or total blocking of a roadway by a police vehicle constitute "deadly force" and are permitted only to protect the officer or general public from death or great bodily harm when no other means of stopping the vehicle is available.

Minneapolis Police Department
407.03 VEHICLE CONTACT
Vehicle contact, rolling roadblocks and roadblocks may only be used when state law permits use of deadly force. (See Volume 5, section on Justified Use of Force) (11/20/01)

Plymouth Police Department
EFFECTIVE DATE August 28, 1996
REVISED: January 11, 2005
SUBJECT: VEHICLE PURSUIT...
X. PURSUIT TACTICS:
A. Vehicle Contact:
1. Vehicle contact may be used only when in conformance with the Department Procedure on Use of Force and when state law permits the use of deadly force, unless the officer believes contact is necessary because the risk of personal injury, created by the continued pursuit, is greater than the risk of injury from the proposed action. Factors to consider when assessing risks include the number and location of potential victims, the speed of the pursued vehicle, traffic conditions, the suspect's driving conduct, and the length of the pursuit.

MISSOURI

Kansas City Police Department
Pursuits and Emergency Police Vehicle Operations
Date of Issue: 2/24/04
Effective Date: 3/10/04
II. ADMINISTRATIVE GUIDELINES ...
D. The use of push bars in a pursuit is prohibited.
POLICE VEHICLE PURSUIT PROCEDURE ...
D. Other Pursuit Issues ...
3. Police vehicles will not be used to ram pursued vehicles.

St. Louis County Police
OFFICE OF THE CHIEF OF POLICE October 22, 2001 ...
II. DEFINITIONS ...
Bumping/Ramming: Deliberate contact by a police vehicle with the pursued vehicle from the front, rear or side. (Not authorized.)

NEVADA

Las Vegas Police Department
6/014.00 VEHICULAR PURSUIT...
USE OF THE PURSUIT IMMOBILIZATION TECHNIQUE (P.I.T.)
Without the willful compliance of the fleeing suspects to voluntarily bringing their vehicle to a stop, circumstances develop which may warrant a forcible stop. Primary and secondary units will exhaust all other means of apprehension before attempting forcible stops and will use only the minimal amount of force which is consistent with the accomplishment of the mission. The use of a vehicle to stop or apprehend a suspect, such as ramming or the use of P.I.T. may be considered a use of deadly force.

Reno Police Department
General Order Title: VEHICLE PURSUITS
Issued: January 3, 2006
PROCEDURES...
Legal Intervention/Emergency Tactics
Setting up roadblocks, using immobilization techniques, boxing in, firing weapons at or from moving vehicles, surrounding a suspect vehicle, as well as forcing vehicles off the road, are all extremely hazardous tactics and should be used only as a last resort when necessary to protect an officer or others from an immediate threat of death or serious physical injury, or to prevent a crime where the

suspect's actions place persons in immediate jeopardy of death or serious physical injury.

NEW HAMPSHIRE

Rochester Police Department
STANDARD OPERATING PROCEDURE
Date of Issue: 1/03/2007
Subject: Vehicle Pursuit
IX. EMERGENCY VEHICLE: VEHICLE PURSUIT...
E. Rules of Pursuit.
1. Intentional contact between police vehicles and the vehicle pursued is prohibited.
a. The forcible stopping of any vehicle through vehicular contact is prohibited. <42.2.3>

NEW JERSEY

New Jersey Police Vehicular Pursuit Policy
Issued: December 1985
Revised: January 1993
Revised: September 1999
Revised: December 2001...
III. VEHICULAR PURSUIT RESTRICTIONS ...
L. Officers involved in a pursuit shall not fire any weapon from or at a moving vehicle nor engage in any vehicle contact action except as a last resort to prevent imminent death or serious injury to the officer or another person where deadly force would otherwise be justified.

OHIO

Cincinnati Police Department
12.535 EMERGENCY OPERATION OF POLICE VEHICLES AND PURSUIT DRIVING
Rev. 07/01/03 Replaces 07/01/02
Policy: ...
Officers will not attempt to stop or slow a pursued vehicle by boxing in, heading off, ramming, or driving alongside during a pursuit.

Fairfield Police Department
3/5/03
41.2.2 Pursuits ...
II. Pursuit Operations ...
H. Roadblocks and ramming may be utilized when:
1. Deadly force is authorized.
2. All other efforts to effect apprehension have failed.
3. The shift supervisor has authorized the use of roadblocks or ramming.

Hamilton County Sheriff's Department
EMERGENCY OPERATION OF SHERIFF'S OFFICE VEHICLES:...
6. Overtaking and Ramming:
a. Officers will make no attempt to stop pursued vehicles by "boxing-in", heading-off, ramming, or driving alongside, during the pursuit.

City of Streetsboro Police Department
41.2.2 PURSUITS...
H. Alternative Strategies and Tactics...
3. Ramming of a suspect vehicle will only be considered if the use of deadly force would be justified, and also considering the extreme danger to the officers, occupants of other vehicles, and other users of the highway.

OREGON

Beaverton Police Department
GENERAL ORDER
SUBJECT: VEHICULAR PURSUITS
EFFECTIVE: AUGUST 1, 1999
REVIEW: AUGUST 2000, 2001, 2002, 2003, 2004
3. PROCEDURES...
D. General Guidelines. The following are general directives concerning a vehicle pursuit: ...
3. Unless specifically authorized by a supervisor, pursuing officers will not drive along side, ram, force off the road or box in the suspect vehicle. Such action may be approved only when the use of deadly force is authorized.

Portland Police Department
630.05 VEHICLE PURSUITS...
Pursuit Intervention Strategies (630.05)...
e. Ramming (deliberate): Using a police vehicle to purposely cause contact with another moving vehicle in order to bring that vehicle to a stop (except PIT). Ramming is considered deadly physical force and is subject to DIR 1010.10.

SOUTH CAROLINA

Spartanburg Public Safety Department
GENERAL ORDERS
Rescinds Policy 210-401 dated January 1, 1994
Rescinds Policy 510.2 dated 1/12/98
Rescinds Policy 510.2A dated 09/30/00
REGULATIONS AND TACTICS DURING PURSUIT...
C. Offensive Tactics. In the course of the pursuit, deliberate contact between vehicles or forcing the pursued vehicle into parked cars, ditches, or any other obstacle; boxing in, heading off, ramming or driving alongside of the

pursued vehicle while it is in motion shall be prohibited unless such actions are specifically authorized by the supervisor. Such actions may be approved only when the use of deadly force would be authorized. Any pursuing vehicle shall not duplicate reckless or hazardous driving maneuvers.

SOUTH DAKOTA

Rapid City Police Department
SUBJECT: Motor Vehicle Pursuits
SUPERSEDES: 04-01
EFFECTIVE: 10-19-05
POLICY...
B. PURSUIT PROCEDURES...
4. Deliberate physical contact between vehicles will not be justified, except in the following circumstances:
a. When officers are in pursuit of known and extremely dangerous fleeing felons who, if allowed to escape, would create a substantial risk of another person being killed or seriously injured, or
b. Except under orders of a supervisor.
Because of the potential dangers involved, pursuing officers are not to pull alongside a fleeing motorist in an attempt to force the subject into a ditch, curb, parked car, or any other obstacle, except as set forth above.

TEXAS

El Paso County Sheriff's Office
Effective Date: 06/30/03
Supercedes: 01/14/03
Subject: VEHICLE PURSUITS ...
IV. PROCEDURES: ...
A. WHEN PURSUITS ARE AUTHORIZED: ...

9. Deputies will not use roadblocks, "ramming", or "boxing in" methods unless deadly force is deemed necessary as outlined in CRS 18-1-707 as amended.

Lubbock Police Department
EMERGENCY DRIVING/PURSUIT ...
SECTION 5 USE OF FORCE IN VEHICULAR PURSUIT
A. GENERAL PROVISIONS. The following measures shall be taken ONLY when established departmental policy would allow the use of deadly force:
1. Intentional striking or ramming of the suspect's vehicle by any portion of the police vehicle;

Potter County Sheriff's Department
Subject: Vehicle Pursuits and Road Blocks
Effective Date: May 31, 2003
B. Vehicle Pursuits:...
7. Pursuit Tactics...
b. Officers may not intentionally use their vehicle to bump or ram the suspect's vehicle in order to force the vehicle to a stop off the road or in a ditch.

The Colony Police Department
POLICY NUMBER: 4.7
GENERAL ORDER
DATE OF ISSUE: OCTOBER 1, 1996
REVISED: JUNE 1, 1997, JULY 10, 2000
PROCEDURES: ...
V. Limitations ...
C. Ramming is strictly prohibited.

Waco Police Department
Title: Emergency Vehicle Operations
Effective: 2007
Cancels: 05-07-01...
Vehicular Pursuits...

L. Use of Force...
2. A suspect posing a deadly force threat may be immobilized using a police vehicle.
3. Vehicular forcible stopping techniques (often referred to as: Ramming, Roadblocks, Moving Roadblocks, PIT Maneuver, etc.) used to end/immobilize a pursuit or potential deadly force threat, may be used if all of the following conditions are met:
a. The officer has been trained in the use of the technique they intend to deploy;
b. The officer is justified in using deadly force against a suspect inside the motor vehicle; and
c. A supervisor must have approved the use of one of the techniques listed above (prior to its use) unless the officer had no time to obtain supervisory approval prior to the use of the technique.

UTAH

Utah Vehicle Pursuit Model Policy
V. PROCEDURE
A. Restrictions
3. The use of forcible stops such as roadblocks and ramming are a last resort measure and should be used only when the use of deadly force is justified.
a. Forcible stops may be undertaken only when the officer or a supervisor has reason to believe that the continued movement of the pursued vehicle would place others in imminent danger of great bodily harm or death AND . . .
c. After all reasonable alternative means of apprehension have been considered and rejected as impractical.

VIRGINIA

Virginia Model Pursuit Policy
EFFECTIVE DATE: July 1, 1999
AMENDS/SUPERSEDES: January 1988...
V. PROCEDURES FOR EMERGENCY DRIVING ...
G. Rules of pursuits
1. Officers shall not intentionally ram, bump, or collide with a fleeing vehicle nor shall officers pull alongside such vehicles in an attempt to force them off the road or into an obstacle.

Fredericksburg Department of Police
Subject: Vehicular Pursuits
Effective Date: April 25, 2006...
C. PURSUIT GUIDELINES: (41.2.2 A, B, C, D, F, H)
Forcible measures to stop a fleeing driver are prohibited except where deadly force is appropriate....
E. PURSUIT TACTICS: (41.2.2 G, 61.3.4)...
3. ROADBLOCKS and RAMMING: (61.3.4)...
c. Ramming is an unsafe act. Ramming is authorized only when a "Use of Deadly Force" is necessary and authorized.

WASHINGTON

Des Moines Police Department
5.08.00 VEHICLE RAMMING/ROADBLOCKS ARE DEADLY FORCE:
An automobile used to force a vehicle off the road or for barricading of a roadway is considered deadly force. Such methods shall not be used unless it is necessary to apprehend a fleeing suspect and is consistent with the requirements of RCW 9A.16 regarding the use of deadly force to apprehend a fleeing felon.

Whatcom County Sheriff's Office
Effective Date: Oct. 1, 2004
Expiration: Remains effective until revised or rescinded.
PURSUIT OF MOTOR VEHICLES
23.5 METHODS OF FORCIBLE STOP
23.5.3 Intentional Intervention (Ramming)
Intentional intervention of a vehicle is a deliberate act of ramming the suspect vehicle with a patrol vehicle for the purpose of functionally damaging or forcing the suspect vehicle off the roadway. Intentional intervention should be considered deadly force and must be used only in the most exigent circumstances due to the possibility of airbag deployment and potential for injury to suspects and deputies.

WISCONSIN

City of Racine Police Department
Date Issued: 10-31-86
Effective Date: 11-12-04
Traffic and Ordinance Violations:
Legal Intervention (ramming or roadblocks) shall be considered the use of deadly force; therefore all deadly force limitations apply. Legal intervention should be used only under the expressed permission of the commanding officer, unless conditions require immediate action.

APPENDIX C: CHART ON RAMMING OR BUMPING

Municipal Pursuit Policies

Policy	Ramming Prohibited	Ramming Deadly Force	Discretionary
Chandler, AZ	X		
Oakland, CA	X		
Citrus County, FL		X	
Daytona Beach, FL		X	
Hillsborough County, FL	X		
Melbourne, FL		X	
Monroe County, FL	X		
Orlando, FL		X	
St. Lucie County, FL		X	
Volusia County, FL	X		
College Park, GA		X	
Peachtree City, GA			X
Iowa City, IA		X	
Isanti County, MN			X
Mankato, MN		X	
Minneapolis, MN		X	
Plymouth, MN		X	
Kansas City, MO	X		

Policy	Ramming Prohibited	Ramming Deadly Force	Discretionary
St. Louis County, MO	X		
Rochester, NH	X		
Las Vegas, NV		X	
Reno, NV		X	
Cincinnati, OH	X		
Fairfield, OH		X	
Hamilton County, OH	X		
Streetsboro, OH		X	
Beaverton, OR		X	
Portland, OR		X	
Spartanburg, SC		X	
Rapid City, SD		X	
El Paso County, TX		X	
Lubbock, TX		X	
Potter County, TX	X		
The Colony, TX	X		
Waco, TX		X	
Fredericksburg, VA		X	
Des Moines, WA		X	
Whatcom County, WA		X	
Racine, WI		X	

State and Model Pursuit Policies

Policy	Ramming Prohibited	Ramming Deadly Force	Discretionary
Connecticut State			X
Florida Highway Patrol Policy	X		
Georgia Model Policy		X	
Hawaii Police	X		
Indiana State Police		X	
Minnesota Police Pursuits Model Policy		X	
Minnesota State Patrol		X	
New Jersey Uniform Pursuit Policy		X	
Utah Model Policy		X	
Virginia Model Policy	X		

Federal Policies

Department of the Treasury		X	

Other Policies

International Association of Chiefs of Police (IACP)		X	